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No. ___

IN THE
Supreme Court of the United States

DAVID H. MILLS, Director of the Indiana Department of Financial Institutions,

Petitioner,

v.

MIDWEST TITLE LOANS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
HEATHER L. HAGAN
ASHLEY E. TATMAN
Deputy Attorneys General

Counsel for Petitioner

QUESTION PRESENTED

Does the Commerce Clause permit a State to regulate consumer loans to its residents by a firm that advertises and conducts multiple loan-related activities in the State, but that requires all loan agreements to be signed in another State?

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PETITION FOR WRIT OF CERTIORARI

David H. Mills respectfully petitions the Court to grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this matter.

OPINIONS BELOW

The opinion of the United States District Court, Southern District of Indiana, is reported as *Midwest Title Loans, Inc. v. Ripley*, 616 F. Supp. 2d 897 (S.D. Ind. 2009), and is reprinted in the appendix at 21a. The Seventh Circuit's opinion is reported as *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (7th Cir. 2010), and is reprinted in the appendix at 1a.

JURISDICTION

The Court of Appeals entered final judgment on January 28, 2010. The Court has jurisdiction to review this case under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. I, Sec. 8, Cl. 3

The Congress shall have Power *** To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes[.]

Indiana Code § 24-4.5-1-201
Territorial application; activities in other states by industrial loan and investment companies

Sec. 201. (1) Except as otherwise provided in this section, this article applies to sales, leases, and loans made in this state and to modifications, including refinancings, consolidations, and deferrals, made in this state, of sales, leases, and loans, wherever made. For purposes of this article, the following apply:

* * *

(d) Except as provided in subdivision (e), a sale, lease, or loan transaction occurs in Indiana if a consumer who is a resident of Indiana enters into a consumer sale, lease, or loan transaction with a creditor or a person acting on behalf of the creditor in another state and the creditor or the person acting on behalf of the creditor has advertised or solicited sales, leases, or loans in Indiana by any means, including by mail, brochure, telephone, print, radio, television, the Internet, or electronic means. . . .

STATEMENT

Regulatory Background

In 2007, the Indiana General Assembly amended the Indiana Uniform Consumer Credit Code ("IUCCC") to impose licensing and regulatory requirements on lenders from Indiana and other States "who are soliciting by any means and then making consumer loans to Indiana residents[.]" App. at 54a; Ind. Code § 24-4.5-1-201. Under this "Territorial Application Provision," a loan transaction occurs in the State of Indiana "if a consumer who is a resident of Indiana enters into a consumer sale, lease, or loan transaction with a creditor . . . in another state and the creditor . . . has advertised or solicited sales, leases, or loans in Indiana by any means," including mail, print and television. Ind. Code § 24-4.5-1-201(1)(d).

If a lender triggers the Territorial Application Provision by lending, advertising or soliciting in Indiana, the IUCCC applies to that lender's loans to Indiana residents. After obtaining the proper licenses from the Department of Financial Institutions, the lender, whether located in Indiana or elsewhere, may make loans to Indiana residents within Indiana's usury limits (capped at a maximum of 36% annually) and note its lien on the title of the consumer's motor vehicle as security for the loan. App. at 52a; Ind. Code § 24-4.5-3-508.

By way of comparison, Indiana also regulates other types of high-interest loans. "Payday" lenders are regulated by Indiana's Small Loan Act, where the lending limit is $550. *See* Ind. Code § 24-4.5-7-101 *et seq.*; § 24-4.5-7-201(4). With interest and fees, the annual rate may be as high as 391% for payday loans. *See Cash in a Flash, Inc. v. McCullough*, 853 N.E.2d 533, 536 (Ind. Ct. App. 2006). However, pursuant to Indiana Code Section 24-4.5-7-403, lenders may not accept security for payday loans other than a customer's check or automated clearinghouse electronic debit. In addition, a lender may obtain a pawnbroker's license pursuant to Indiana Code Section 28-7-5-1 *et seq.*, and charge interest and fees resulting in an APR as high as 276%. Ind. Code § 28-7-5-28. A pawnbroker, however, must retain physical possession of the borrower's property as security.

Midwest Title's Business Model

Midwest Title Loans, Inc. is a consumer installment loan company incorporated in Illinois and licensed by the Illinois Division of Financial Institutions. App. at 48a. Midwest Title is known as a "title lender" because it operates stores (including 23 in Illinois) from which it provides "title loans"—loans secured by title to the borrower's motor vehicle. *Id.* at 48a-49a. Although there are no Midwest Title stores in Indiana, Midwest Title has made thousands of title loans to Indiana residents who have taken their motor vehicles and titles to one

of Midwest Title's Illinois stores and applied in person for a loan. *Id.* at 50a. Approved applicants execute loan documents at Midwest Title's stores and provide Midwest Title with keys to the collateral vehicle in order to make self-help repossession easier in case of default. *Id.* at 50a-51a. Midwest Title submits the necessary documents to the Indiana Bureau of Motor Vehicles so that Midwest Title's lien will be noted on the title provided by the borrower. *Id.* at 52a. It provides the borrower with loan proceeds at its store in the form of a cashier's check drawn on an Illinois bank. *Id.* at 51a.

Midwest Title's title loans are payable in monthly installments over 12, 18, or 24 months, and the typical amount loaned is approximately 50% of the wholesale value of the vehicle securing the loan. *Id.* at 49a. Midwest Title charges an annual percentage interest rate of approximately 300%. *Id.* If permitted to apply, the Indiana Code would limit the per annum interest rate that Midwest Title could charge Indiana customers to 36%. *Id.*

Midwest Title requires Indiana borrowers to travel to Illinois to obtain a title loan, but with each such loan to an Indiana borrower, Midwest Title undertakes or anticipates several contacts with Indiana. For example, prior to this lawsuit, Midwest Title advertised on television stations in Indiana and bought listings in the Indiana Yellow Pages. *Id.* at 52a. Midwest Title sent annual mailings to past customers in Indiana in an attempt to solicit repeat

business. *Id.* at 51a. And, as noted, Midwest Title has submitted necessary documents to the Indiana Bureau of Motor Vehicles to record its liens on borrowers' car titles. *Id.* at 52a.

Continuing the transaction, Indiana borrowers may cash loan checks and deposit loan proceeds at Indiana banks and make their payments through the mail or in other ways that cross state lines. Upon default, Midwest Title pays an unaffiliated third party repossession company in Indiana to repossess the vehicle and then obtains a new title from the Indiana Bureau of Motor Vehicles showing Midwest Title as the owner of the vehicle. *Id.* at 53a. Repossessed vehicles remain in Indiana until sold through an unaffiliated Indiana auction house. *Id.*

Background of this Lawsuit

In August 2007, shortly after Indiana's Territorial Application Provision became law, the Supervisor of the Division of Consumer Credit—a division of the Department of Financial Institutions—sent a letter to Midwest Title advising that Indiana law "requires lenders who are soliciting by any means and then making consumer loans to Indiana residents to be licensed[.]" *Id.* at 54a. The letter further explained that under Indiana law, "[i]f a creditor has violated [this provision], the loan is void and the debtor is not obligated to pay either the principal or loan finance charge, as set forth in [Section] 24-4.5-5-201." *Id.*

Midwest Title stopped offering loans to Indiana residents and charging or collecting interest on loans to Indiana borrowers made between July 1, 2007, and Midwest Title's receipt of the letter ("Covered Loans"). *Id.* at 55a. It also refunded all previous interest payments on the Covered Loans but continued to collect principal. *Id.*

On November 16, 2007, Midwest Title filed its complaint challenging Indiana's ability to enforce the IUCCC against it. The district court issued an Order on March 24, 2009, granting Midwest Title's motion for summary judgment and declaring the Territorial Application Provision "unconstitutional as applied to Midwest Title to regulate title loans made wholly in the state of Illinois[.]" *Id.* at 43a. The district court issued a permanent injunction forbidding the Department of Financial Institutions to apply the IUCCC to "loans made wholly in the state of Illinois to Indiana residents." *Id.*

The Seventh Circuit affirmed, holding that regulating a contract physically signed in another State violates the Commerce Clause, regardless of interstate contacts. The opinion listed several pros and cons for regulating high interest loans and various state interests for doing so, but the court's rationale boiled down to one sentence: "The contract was, in short, made and executed in Illinois, and that is enough to show that the territorial-application provision violates the commerce clause." *Id.* at 18a.

REASONS FOR GRANTING THE PETITION

States have a compelling interest in protecting their residents from predatory lending. Indeed they have always been permitted, even expected, to regulate lending through usury laws "despite the burden on commerce." *Aldens, Inc. v. Packel*, 524 F.2d 38, 48 (3d Cir. 1975). In the decision below, the Seventh Circuit acknowledged as much, App. at 8a, but ruled nonetheless that because Midwest Title's loan contracts are executed in Illinois, Indiana may not regulate Midwest Title's loans to Indiana residents.

This holding, which turns entirely on the location where the contract was executed rather than on the regulating State's overall interest in the transaction, conflicts with decisions of other circuits concerning state regulation of interstate consumer loan transactions and also causes unnecessary tension with due process doctrine. The decision is a problem not just for Indiana, but for many other States (and the District of Columbia) whose consumer protection laws could apply to contracts executed out of state. Particularly given the recent recession and the market it has created for high-interest loans, the Court should take this case to resolve whether States may regulate out-of-state loans to their citizens.

I. The Decision Below Conflicts With Decisions of Other Circuits Permitting States to Regulate Loans Issued in Other States to Their Citizens

In a series of Commerce Clause challenges brought by Illinois mail-order business Aldens, Inc., the Third and Tenth Circuits (as well as the Seventh Circuit) have permitted States to regulate credit terms of interstate purchases. *See Aldens, Inc. v. Ryan*, 571 F.2d 1159, 1161 (10th Cir. 1978); *Aldens, Inc. v. LaFollette*, 552 F.2d 745, 748 (7th Cir. 1977); *Aldens, Inc. v. Packel*, 524 F.2d 38, 41 (3d Cir. 1975). Under the Aldens business model, customers would apply through the mail to make purchases on credit, and Aldens would accept or reject the contract in Chicago. *Packel*, 524 F.2d at 41. If Aldens accepted the contract, it was fully executed, and Aldens would ship the merchandise to the customer in a transaction governed by the contract's terms. *Id.*

In *Packel*, the Third Circuit upheld Pennsylvania's law imposing interest rate caps (and requiring specific disclosures in contracts and billing statements) on such transactions with Pennsylvania residents. The court thought "it clear beyond question that Pennsylvania has a substantial interest in the rates paid by its residents to foreign companies for the use of money and in the contracts setting those rates." *Id.* at 43. The court explained that the Pennsylvania law did not impose improper trade protectionism because it "place[d]

Pennsylvanians and Illini exactly on a par in selling to Pennsylvanians. No local interest is given an advantage within or without Pennsylvania. If Aldens wants to sell to a Pennsylvanian it can only do so on the same terms as a Pennsylvania mail order seller[.]" *Id.* at 47. In other words, the State "is not attempting to export obligations to its treasury, or to export its public policy on consumer credit interest rates. It merely seeks to afford uniform protection to all Pennsylvania residents with respect to such rates." *Id.* at 49.

Furthermore, the Pennsylvania law did not impose an undue burden on interstate commerce: "The burden on interstate commerce does not depend upon the happenstance of respective locations of buyer and seller. The fundamental issue is whether the national interest in the free movement of money, credit, goods and services outweighs the valid local interest in restricting maximum interest rates on consumer 'loans'. . . ." *Id.* at 47-48. The court held that the local interest was stronger based on "the historical recognition that the states may, despite the burden on commerce, enact varying usury laws and varying contract laws[.]" *Id.* at 48. In contrast, the Seventh Circuit in this case held that "nondiscriminatory local regulations [can be] invalidated without a balancing of local benefit against out-of-state burden [when] states actually attempt to regulate activities in other states." App. at 10a.

Like the Third Circuit, the Tenth Circuit upheld an Oklahoma statute setting maximum interest rates for credit sales, observing that "the subject matter and purpose of the state regulation is the present day starting place for a consideration of the issues before us; thus the degree of interest of the state in the subject matter regulated, and how fundamental is this local interest." *Ryan*, 571 F.2d at 1161. The court applied a balancing test and rejected "[t]he 'per se' approach . . . to the Commerce Clause. . . . The states can, of course, pass Acts which affect commerce unless the burden so imposed greatly exceeds the extent of the local benefits." *Id.* Further, the court noted that the Supreme Court had "'rejected the contention' that the doctrines of place of contracting and place of performance should govern, and held that they must give way to the 'degree of interest' the state had in the transaction of subject, and give way to the consequences of the contracts in the regulating states." *Id.* (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648 (1950)); *see also Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977) (upholding interstate application of a Wisconsin law setting a maximum permissible finance charge for extension of credit under open-end credit plans).

The Pennsylvania and Oklahoma usury laws upheld in the *Packel* and *Ryan* cases remain in force and would govern any loans from Midwest Title to residents of those states, regardless where made. *See* 69 Pa. Cons. Stat. Ann. § 1103 (West 2010);

Notice to those Engaging or Considering Engaging in Nonmortgage Consumer Lending to Pennsylvania Residents, 38 Pa. Bull. 3986, July 26, 2008, *available at* http://www.pabulletin.com/secure/data/vol38/38-30/1371.html (confirming that Pennsylvania law applies to lenders located in other States who lend money to Pennsylvania residents at rates greater than 6% per year); Okla. Stat. Ann. tit. 14 § 1-201(5) (West 2010) (requiring an Oklahoma license for any lender who issues a loan from another State to an Oklahoman, and precluding such lender from "collect[ing] charges through actions or other proceedings in excess of those permitted by" Oklahoma law or "enforce[ing] rights against the . . . debtor, with respect to the provisions of agreements which violate" Oklahoma law).

In fact, the Third Circuit just recently applied Pennsylvania law in adjudicating a dispute over a loan issued to a Pennsylvania citizen in Delaware, notwithstanding a Delaware choice-of-law clause in the loan contract. *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616, 624 (3d Cir. 2009). The court stated that because "Pennsylvania's interest in the dispute, particularly its antipathy to high interest rates such as the 300.01 percent interest charged in the contract at issue, represents such a fundamental policy[,] we must apply Pennsylvania law." *Id.*

So, while *Packel* and *Ryan* permit Pennsylvania and Oklahoma to regulate Midwest Title's loans to their citizens made in Illinois, the decision below

precludes Indiana from doing so. The Seventh Circuit plainly parted ways with both cases when it ruled that the site of contract execution, rather than a State's degree of interest in the transaction, determined whether the State could regulate. App. at 18a.

What is more, the *Aldens* cases undergird a more recent Tenth Circuit decision that conflicts with the decision below. In *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2062 (2009), the court applied the "degree of interest" principles from *Ryan* to hold that a Kansas consumer lending regulation could apply to loans offered by an out-of-state company over the internet. In *Quik Payday*, the Tenth Circuit was very clear that "[e]ven if the Kansas resident applied for the loan on a computer in Missouri, other aspects of the transaction are very likely to be in Kansas—notably, the transfer of loan funds to the borrower would naturally be to a bank in Kansas[,]" such that "the transaction would not be wholly extraterritorial, and thus not problematic under the dormant Commerce Clause." *Quik Payday*, 549 F.3d at 1308. Thus, the Tenth Circuit found Quik Payday's contacts with the State of Kansas and the impact of the loan in Kansas—not simply the location where the contract was signed—to be of paramount importance.

By way of comparison, Hoosiers who borrow money from Midwest Title receive a check in Illinois, but even if they cash it there, these borrowers will

most likely spend the proceeds in Indiana, just as borrowers in *Quik Payday* were reasonably expected to spend their loan proceeds in Kansas. Yet the Seventh Circuit departed from the seemingly settled law exemplified by the *Aldens* and *Quik Payday* cases and looked only to where Midwest Title signs its contracts rather than to where the transactions begin (with advertisements in Indiana) and ultimately lead (back to Indiana). This conflict in result and reasoning justifies granting the Petition.

II. The Question Presented Warrants Review Because Many States Regulate Interstate Loans Amidst an Escalating Consumer Debt Crisis

All States regulate consumer loan interest rates, and at least *twenty* States plus the District of Columbia apply them to loans crossing state lines. *See* Small Dollar Loan Products Scorecard: Statutory Backup, *available at* http://www.consumerfed.org/elements/www.consumerfed.org/File/statutory_backup_08(3).pdf. The escalating consumer debt crisis underscores the significance of such State limits—and reinforces the need for review here.

1. Americans depend on credit now more than ever, and although "consumer over-indebtedness has been many years in the making, only recently has this crisis attracted widespread public attention." Lois R. Lupica, *The Consumer Debt Crisis and the Reinforcement of Class Position*, 40 Loy. U. Chi. L.J.

557, 557 (2009). The 2008 rescue of Bear Stearns and the collapse of Lehman Brothers, along with "the corresponding seizure of the financial markets in the United States, for the first time, have drawn widespread public attention to the operation of the financial system and its connection to and relationship with consumer debt." *Id.* at 558.

Debt levels have soared in the United States in part because increasingly innovative, higher-cost consumer debt products have expanded access to credit across economic classes. It is no secret that lower-income households are targeted by lenders because they are less likely to pay off their credit card debt or other high cost loans each month. *Id.* at 580. The resulting "debt treadmill" ensnares these consumers and makes more money for lenders.

Overall household consumer debt, even excluding mortgage debt, rose from $351 billion in 1980 to nearly $2,200 billion in 2006. *Id.* at 557 n.1. But since 2006, the situation has only become more urgent. The faltering economy has caused more people to resort to fringe banking as unemployment rates have increased and people have attempted to avoid foreclosure. In that environment, car title lending is one of the new innovations in high interest debt products. This industry "has grown tremendously in recent years in states that have failed to take adequate steps to protect borrowers." Amanda Quester and Jean Ann Fox, *Car Title*

Lending: Driving Borrowers to Financial Ruin, at 9, *available at* http://www.responsiblelending.org/other-consumer-loans/car-title-loans/rr008-Car_Title_Lending-0405.pdf. Sensing an opportunity to exploit a sour economy, the title lending industry has spent much time and money in recent years lobbying to charge high interest rates for such loans. *Id.* at 10.

High interest rate loans are particularly damaging because of possible long-term ramifications. Even apart from imposing difficult payments and high interest rates, these loans can have a negative impact on credit scores, particularly when borrowers initiate new loans seriatim to pay off prior loans, a practice that can cause borrowers to accumulate large amounts of debt. And because eligibility for low-interest mortgages, insurance, housing, and employment are often affected by credit history, temporary financial hardships that push the needy into the debt of predatory lenders can inflict financial scars lasting years into the future.

In this atmosphere of escalating debt and the resulting harm it causes, many States have ignored the pleas of industry lobbyists and, instead, passed laws to protect their citizen-borrowers. Indiana has concluded that permitting high interest rates for title loans is a bad idea, and if Indiana chooses to regulate lenders who solicit residents to take out 300% interest loans, it should be able to do so. If Indiana lacks that power, its citizens will go unprotected, for it is highly unlikely that other

States, no matter what regulations they impose on title lenders, will take action based on complaints by Indiana residents. Such a regulatory gap not only has implications for interest-rate caps, but also for more fundamental transgressions such as outright fraud. If Indiana cannot protect its citizens from unfair and deceptive trade practices, who will?

At the very least, States need to know just how far they can go when it comes to protecting their citizens from out-of-state predatory lending.

2. Indiana, Pennsylvania and Oklahoma are certainly not the only States to regulate loans to their residents where loan contracts are signed in other States. States have long controlled interest rates that lenders may offer their residents from across State borders. *See Packel*, 524 F.2d at 48.

In fact, at least twenty States and the District of Columbia have laws that can apply to loan contracts signed in other States. Some have statutes that, like Indiana's Territorial Application Provision, apply once a lender advertises in or directly solicits customers of the regulating State. *See, e.g.*, D.C. Code § 28-3301(h) (regulating consumer credit transactions involving a D.C. resident if the lender "has solicited or advertised in the District of Columbia by any means, including mail, brochure, telephone, print, radio, television, internet, or any other electronic means"); Kan. Stat. Ann. § 16a-1-

201[1] (controlling loans if "the creditor induces the consumer who is a resident of this state to enter into the transaction by solicitation in this state by any means, including but not limited to: Mail, telephone, radio, television or any other electronic means."); Me. Rev. Stat. Ann. tit. 9-A § 1-201 (applying if "[t]he creditor, wherever located, induces the consumer who is a resident of this State to enter into the transaction or open-end credit plan by face-to-face, mail, telephone or electronic mail solicitation in this State"); *see also* N.Y. Banking Law § 340 (triggered by solicitation within the State but including an exception for de minimis activity); N.C. Gen. Stat. § 53-190 (applying if any solicitation occurs inside North Carolina).

Other States' consumer loan regulations apply to loan contracts signed out-of-state based on the lender's number of transactions with the regulating State's residents, or the amount of the loan, or the rate of interest charged. *See, e.g.*, Ariz. Rev. Stat. Ann. § 6-1251 (applying to any lender who makes three or more payday or title loans to Arizona residents in a single calendar year); N.M. Stat. Ann. § 58-15-24 (applying to loans "made outside this state" for "the value of two thousand five hundred dollars ($2,500) or less . . . ."); Conn. Gen. Stat Ann. § 36a-555 (requiring licensing of any lender who loans

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[1] Upheld in *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2062 (2009).

less than $15,000 at an interest rate higher than 12% per annum).

Still other States' laws apply if the consumer makes payments from, or spends loan proceeds in, that State, or if a consumer in the State consummates the loan through the mail or over the internet. *See, e.g.*, 2010 Oregon Laws 1st Sp. Sess. Ch. 23 (S.B. 993) (applying to payday or title loans made to Oregon residents "if the consumer makes a payment on the loan from Oregon . . ."); W. Va. Code § 46A-1-104 (applying if payment on the loan is to be made from West Virginia); Vt. Stat. Ann. tit. 8 § 2238 (applying if the commercial loan is made "for use" in Vermont); Minn. Stat. Ann. § 47.601, sub. 3 (applying Minnesota law to out-of-state lenders that "make[] a consumer small loan electronically via the Internet"); Ohio Rev. Code Ann. § 1321.17 (precluding enforcement of loan contracts that exceed Ohio's allowable rate of interest, including those made by lenders from other States who primarily make loans by mail).

Virginia regulates *payday* loans regardless of the location of the lender, *see* Va. Code Ann. §§ 6.1-445, 6.1-469.1, and just this year enacted a statute requiring that all *title* loans involving a resident of Virginia be made in accordance with Virginia law "whether or not the [lender] has a location in the Commonwealth. . . ." *See* Va. Code § 6.1-481, *available at* http://leg1.state.va.us/cgibin/legp504.exe

?101+ful+CHAP0477. Similarly, South Carolina requires lenders to obtain a license if lending to a customer that resides in South Carolina "whether or not that person has a location in South Carolina[.]" S.C. Code Ann. § 34-39-130(C).

Furthermore, echoing the holding in *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616 (3d Cir. 2009) (discussed in Part I, *supra*), several States effectively regulate cross-border lending to their citizens by limiting liability for loans made at rates higher than allowed by the State's law. *See* Cal. Fin. Code §§ 22322-22324; N.C. Gen. Stat. § 53-190; Ohio Rev. Code Ann. § 1321.17; Okla. Stat. Ann. tit. 14A § 1-201(5); 7 P.S. § 6203; R.I. Gen. Laws § 19-14.2-1(c); W. Va. Code § 46A-1-104; Wyo. Stat. § 40-14-120(e).

Extraterritorial application of consumer loan regulations is thus an important issue throughout the Nation, both for regulating lenders and for enforcing loan contracts. The Court's intervention is warranted so that all lenders, borrowers and regulators will be governed by the same rules of extraterritoriality.

III. The Court Below Erroneously Relied on Price-Affirmation Cases and Thereby Created New Tension Between Commerce Clause and Due Process Doctrine

In the decision below, the Seventh Circuit relied on *Healy v. Beer Institute*, 491 U.S. 324 (1989), and

Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986), to conclude that the Commerce Clause compels invalidation of any state statute that regulates commercial activity beyond the state's borders, regardless of the impact that activity has in the regulating State. These cases, however, stand only for the highly limited proposition that state laws are invalid where they (1) regulate wholly extraterritorial commercial activity and (2) protect the state's consumers at the expense of consumers in other States. This Court has announced other doctrines for evaluating legitimate State consumer-protection laws that apply to out-of-state commercial undertakings.

A. *Brown-Forman* and *Healy* Do Not Stand for the Rule Applied Below

Brown-Forman and Healy both addressed alcohol price-affirmation statutes that prevented consumers in other States from getting better prices than consumers in the regulating State. In *Brown-Forman*, 476 U.S. at 575, the Court invalidated a New York price-affirmation statute that required liquor distillers and producers to sell their wares to New York wholesalers at prices no higher than the prices they charge wholesalers anywhere else in the country. And because the statute required distillers and producers to affirm their prices in other States 10 days prior to the effective date, it both regulated commerce occurring wholly outside New York State *and* did so at the expense of businesses and

consumers in other States. That is, once producers filed their price affirmations, they could lower their prices to New York wholesalers, but not wholesalers in other States. *Id.* at 577.

A few years later, in *Healy*, 491 U.S. at 329, the Court extended its producer-level holding from *Brown-Forman* to the wholesale level. In *Healy*, the Court invalidated a price-affirmation law precluding wholesalers from selling to retailers outside Connecticut for less than to retailers in Connecticut. In so doing, the Court stated that the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Id.* at 336.

These price-affirmation laws had the effect of dictating prices that an out-of-state producer could charge to an out-of-state buyer—exactly the sort of extraterritorial application of laws that the Commerce Clause prohibits. While Connecticut had a legitimate interest in keeping absolute prices low for its residents, that interest was not implicated by the comparative prices charged to consumers in other States. *Id.* States do not, that is, have a legitimate interest in ensuring that their residents pay the lowest prices offered anywhere. Such an "attempt[] to give local consumers an advantage over consumers in other States" amounts to illegitimate economic protectionism. *Brown-Forman*, 476 U.S. at 580.

Accordingly, the Court's prohibition against "regulating commerce occurring wholly outside that State's borders" does not mean that States may not under any circumstances regulate transactions where the contract is signed outside the State. Rather, it means only that a State may not regulate extraterritorially where to do so benefits its own citizens only by burdening the citizens of other States.

Indiana's regulation of title loans, while seeking to limit the price of capital for Hoosiers, does not do so at the expense of residents of other States. Indiana imposes a determinate APR cap for title loans to Indiana residents, but it does not require Midwest Title to offer rates no higher than rates it offers to Illinois residents. Accordingly, there is no illegitimate economic protectionism. Rather, Indiana's stake is the traditional compelling interest in protecting consumers from predatory lending practices that ultimately have negative effects in Indiana.

Another critical distinction with *Brown-Forman* and *Healy* is the lack of any prospect that similar statutes in other States would lead to an interlocking web of regulations subjecting individual loans to multiple, and perhaps inconsistent, regulatory oversight. In *Healy*, the Court was troubled that "the practical effect of this affirmation law, in conjunction with the many other beer-pricing

and affirmation laws that have been or might be enacted throughout the country, is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Healy*, 491 U.S. at 337. The Indiana statute creates no interlocking regulations: it has no effect on the interest rates Midwest Title charges borrowers outside of Indiana, and no loan that Midwest Title makes to an Indiana consumer subject to the Indiana APR caps will be stymied by conflicting laws of other States.

Indiana's title lending statute is not the kind of law that the Court rejected in *Brown-Forman* and *Healy*, and the Seventh Circuit erred in relying on those cases.

B. A more deferential standard applies to laws that affect commerce in other States while protecting against injuries at home

Because Indiana's title lending law vindicates compelling state consumer-protection interests, the Seventh Circuit should have applied a far more deferential standard. At most it should have subjected the Indiana law to some sort of balancing test such as the Court has historically used to evaluate laws having interstate effects while providing legitimate local protection. *See Southern Pac. Co. v. Arizona*, 325 U.S. 761, 775-76 (1945); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Edgar v.*

MITE Corp., 457 U.S. 624, 644 (1982); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987); *but see Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995) (holding that rational-basis review is appropriate when statutes "do not give local firms any competitive advantage over those located elsewhere.").

Indiana's law would easily survive a balancing test. Indiana and other States historically have had a compelling interest in protecting their residents from predatory lending in all forms, including payday loans, pawn loans, title lending and revolving debt. Indeed, if Midwest Title's loans were secured by real property located in Indiana, there surely would be no question that Indiana could regulate them. An automobile owned by an Indiana resident, while not real property, has similarly strong ties to the State because it is registered in Indiana, is driven mostly on Indiana's roads, and embodies a significant amount of the Indiana resident's material wealth.

In contrast, the burden that the IUCCC imposes on interstate commerce—capping Midwest Title's APR—is light. It does not keep Midwest Title from lending to Indiana residents, and does not even cap Midwest Title's interest rates for Indiana residents if Midwest Title is willing to forgo advertising and soliciting in Indiana. Midwest Title has never even

attempted to argue that Indiana's statute would fail a balancing test.[2]

C. Because due process plainly permits one State's law to apply to a financial contract signed in another State, the decision below creates tension in the law of extraterritorial application

The Commerce Clause is not the only constitutional limit on extraterritorial application of state law. The Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause also limit how far States may go in regulating activities that occur in other States. Scholars agree that the Court's decisions concerning constitutional limits on the extraterritorial application of State law have been "murky and contradictory," yielding "no clear answer" as to proper circumstances for applying Commerce Clause or due process doctrine. Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle In Choice of Law and Legislation*, 84 Notre Dame L. Rev. 1057, 1061 (2009). Indeed, "constitutional doctrine to this day does not clearly tell us to what extent states may regulate people and things outside

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[2] Balancing would also address the Seventh Circuit's concern about whether Indiana could regulate gambling by its citizens at Las Vegas casinos. App. at 12a. Gambling at an out-of-state casino does not imply the same sort of long-term ongoing transaction involving the borrower's home state as a 24-month title loan bearing 300% interest.

their borders." Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 Notre Dame L. Rev. 1133, 1154 (2010); *see also* Katherine Florey, *State Extraterritorial Powers Reconsidered: A Reply*, 85 Notre Dame L. Rev. 1157, 1157 (2010) (hereinafter, Florey, *Reply*) (describing multiple existing approaches to problems of extraterritorial application as "a haphazard assemblage of sometimes-inconsistent principles that courts have failed to justify or reconcile to any meaningful degree").

By treating *Healy* and *Brown-Forman* as it did, however, the Seventh Circuit in this case unnecessarily created *new* tension between due process doctrine and Commerce Clause doctrine in non-tax economic regulation cases.[3]

1. Due process analysis permits extraterritorial regulation based on a range of state connections

In due process cases, this Court has examined *all* relevant contacts with the regulating State, not simply the site of contract execution, to discern which State's laws can apply. A State's power to regulate is not "determined by a conceptualistic

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[3] Because Full Faith and Credit doctrine generally tracks due process doctrine or otherwise applies in a discrete set of cases not relevant here, *see Allstate Insurance Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981), our discussion focuses only on tensions between the Commerce and Due Process Clauses.

discussion of theories of the place of contracting or of performance. Instead [the Court has] accorded great weight to the consequences of the contractual obligations in the state where the insured resided and the degree of interest that state had in seeing that those obligations were faithfully carried out." *Travelers Health Association v. Virginia*, 339 U.S. 643, 647-48 (1950) (internal citations omitted).

Accordingly, the Court has permitted, in response to due process objections, extraterritorial application of consumer protection statutes where multiple contacts of various types exist between the regulating State and the regulated business. In *Watson v. Employers Liability Assurance Corporation*, 348 U.S. 66, 72 (1954), the Court held that a Louisiana statute could constitutionally apply to a Massachusetts insurance contract because it "is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers." In fact, "[p]ersons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. . . . The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help." *Id.* Furthermore, "Louisiana courts in most instances provide the most convenient forum for trial of these cases." *Id.* Finally, because of "Louisiana's legitimate interest in safeguarding the rights of persons injured there[,] . . . the direct action provisions . . . do not violate due process." *Id.* at 73.

Similarly, in *Allstate Insurance Company v. Hague,* 449 U.S. 302 (1981), the Court upheld application of a Minnesota insurance stacking provision to policies issued in Wisconsin. Collecting prior authority (including *Watson*), the Court ruled that, "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 312-13. Again, what mattered was the aggregation of significant contacts, not the site of contract formation.

Even when the Court has rejected extraterritorial application of a consumer protection statute on due process grounds, it has done so based on lack of minimum contacts rather than the site of contract formation. In *Home Insurance Company v. Dick*, 281 U.S. 397, 408 (1930), the Supreme Court found that Texas did not have legislative jurisdiction to regulate an insurance policy that had been issued (1) in Mexico, (2) by a Mexican insurer, (3) to a Mexican citizen, and (4) covering a Mexican risk, when "nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas." Again, the implication is not that site of contracting was determinative, but that some aggregation of minimum contacts, including reasonably foreseeable injury in the rule-of-decision state, be present.

Based on these precedents, lower federal courts resolve matters of legislative jurisdiction based on minimum significant contacts, not site of contracting. In *Gerling Global Reinsurance Corporation of America v. Gallagher*, 267 F.3d 1228, 1237-38 (11th Cir. 2001), for example, the court, relying on *Hague*, held that legislative jurisdiction exists where there is "at least some minimal contact between a state and the regulated subject matter or transaction . . . ." *See also Adventure Communications v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 437 (4th Cir. 1999) (concluding that "although not identical, judicial and legislative jurisdiction are determined pursuant to like guidelines").

Brown-Forman and *Healy* did not repudiate those cases. Indeed, the Court in *Healy* relied expressly on Justice White's plurality opinion in *Edgar v. MITE Corporation*, which stated that "[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts." *Edgar*, 457 U.S. at 643. Furthermore, the Court has made some efforts to reconcile Commerce Clause and due process doctrine as they relate to extraterritorial application of State law. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572-73 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003). As the decision below demonstrates, however, further guidance is plainly needed. *See* Florey, *supra*, at 1112 ("while the Supreme Court has suggested in cases like *Gore* and

Campbell that the two lines of cases may overlap, it has never fully reconciled them. As a result, the current doctrine lacks coherence, clear boundaries, and ease of application").

2. The Seventh Circuit acknowledged that it was diverging from standard choice-of-law principles

The Seventh Circuit expressly acknowledged that its ruling conflicts with traditional choice-of-law doctrine predicated on due process principles, but it dismissed the significance of that conflict. *Id.* at 16a-17a. In particular, it recognized that, if a borrower were to sue Midwest Title for violating the IUCCC, "an Indiana court might rule that Indiana had the 'most intimate contacts' with the transaction and therefore that its law applied even though the loan had been made in Illinois." *Id.* at 16a. One might think that a state interest enabling *choice-of-law jurisdiction* would also, by definition, enable *extraterritorial regulation*. Not so, according to the decision below: "the presence of an interest that might support state jurisdiction without violating the due process clause of the Fourteenth Amendment [does not] dissolve[] the constitutional objection to extraterritorial regulation[.]" *Id.*

To restate: according to the Seventh Circuit, the IUCCC, with its title loan contract rate caps and rescission rights, could constitutionally supply the rule of decision in a lawsuit between Midwest Title

and an Indiana borrower over a contract signed in Illinois loaning money at 300% interest. Yet, Indiana may not constitutionally enforce prophylactic regulations against Midwest Title to prevent that injurious loan from ever being made. So, while the Department of Financial Institutions *cannot* prevent Midwest Title from making 300% loans, it *can* encourage Hoosier borrowers to sue under the IUCCC to cancel 300% loan contracts after spending the proceeds. Such an outcome would appear to be a win/win for Hoosier borrowers, but it would also yield an inefficient regulatory model, to say the least.

More to the point, the Seventh Circuit provided no explanation for how it can be constitutionally correct to treat prophylactic regulations differently from post-hoc liability laws. Different standards cannot be justified simply because "[t]he concerns behind the due process and commerce clauses are different." *Id.* at 17a. Presumably, *both* clauses apply to the extraterritorial application of *both* kinds of laws. This Court itself has long rejected any meaningful distinction between statutes and common law, or between prophylactic and post-hoc applications, when it comes to constitutional challenges to State law. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Gore*, 517 U.S. at 572 n.17; *see also* Florey, *Reply*, *supra*, at 1158 (observing that "a distinction between regulation by state legislatures and application of

state law by state courts . . . simply cannot be maintained or justified").

Nor does the Seventh Circuit's citation to *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992), resolve the tension. *Quill* confirmed the rule from *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), that a State can require an out-of-state business to collect and remit sales and use taxes only if the business has a "physical presence" in the taxing State—a standard more limiting than what the Due Process Clause would permit. *Quill*, 504 U.S. at 314. *Quill* held as it did, however, largely as a matter of *stare decisis* rather agreement with *Bellas Hess*. *Id.* at 311 (observing that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today").

And though it refused to overturn the *Bellas Hess* physical-presence rule in *Quill*, the Court repeatedly stated that the rule applies only to sales or use tax collection requirements. "The same physical-presence requirement that *Bellas Hess* established for sales and use taxes" does not even apply "to other types of taxes." *Quill*, 504 U.S. at 314; *see also id.* at 317 (noting that *Bellas Hess* rule does not apply in cases "concerning other types of taxes"). So, while due process and Commerce Clause analyses need not be identical, the Court has minimized any tension between them by making it clear that a regulating State's legitimate interests are relevant to both,

except where sales and use taxes are at issue, in which case only physical presence counts under the Commerce Clause.

On its own, however, the Seventh Circuit has now effectively extended this limited Commerce Clause formalism to the larger regulatory context. Doing so creates palpable tension with due process doctrine across many regulatory sectors—tension that this Court apparently thought it had limited to the sales and use tax context in *Quill*.

One obvious consequence may be that large swaths of choice-of-law rules, arrived at incrementally over decades of highly factual litigation over forum-state regulatory interests, will now be open to question. In other words, despite its insouciant effort to confine Commerce Clause analysis to the actions of state regulators, the Seventh Circuit has effectively issued an invitation for litigants to argue choice-of-law issues based not only on which State has the greater regulatory interest (an argument that usually sounds in due process but that also fits the Commerce Clause balancing test), but also based on the formalistic question of where the contract was signed (an argument arising exclusively under the Commerce Clause).

In order to avoid unnecessary tension between due process and Commerce Clause doctrine—which the Seventh Circuit's ruling all but ensures—

extraterritorial application of a state consumer protection law should for all purposes turn not only on where the contract at issue was executed, but also on the State's overall interest in the transaction. The Seventh Circuit recognized Indiana's compelling interest in regulating Midwest Title's loans to its residents, but rejected the constitutional significance of that interest because of where the parties signed the formal contract. The Court should take this case to decide whether that was the proper analysis.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
HEATHER L. HAGAN
ASHLEY E. TATMAN
Deputy Attorneys General

Counsel for Petitioner

Dated: April 28, 2010

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 09-2083

MIDWEST TITLE LOANS, INC.,
Plaintiff-Appellee,

v.

DAVID H. MILLS, Director of the Indiana Department of Financial Institutions,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:07-cv-1479-SEB-DML—Sarah Evans Barker, *Judge.*

Argued November 10, 2009—
Decided January 28, 2010

Before POSNER and FLAUM, *Circuit Judges*, and DER-YEGHIAYAN, *District Judge.*[*]

POSNER, *Circuit Judge.* An Illinois loan company, Midwest Title Loans, Inc., sued under 42 U.S.C. § 1983 to enjoin, as a violation of the commerce clause, the application to Midwest of Indiana's version of the Uniform Consumer Credit

[*] Hon. Samuel Der-Yeghiayan of the Northern District of Illinois, sitting by designation.

Code (a model code, provisions of which have been adopted in several states). Ind. Code §§ 24-4.5-1-101 *et seq.* The district court entered a permanent injunction, and the state appeals.

A provision added to the Indiana version of the model code in 2007 and aptly termed the "territorial application" provision states that a loan is deemed to occur in Indiana if a resident of the state "enters into a consumer sale, lease or loan transaction with a creditor . . . in another state and the creditor . . . has advertised or solicited sales, leases, or loans in Indiana by any means, including by mail, brochure, telephone, print, radio, television, the Internet, or electronic means." § 24-4.5-1-201(1)(d). If the territorial-application provision is triggered, the lender becomes subject to the code and must therefore get a license from the state to make consumer loans and is bound by a variety of restrictions that include a ceiling on the annual interest rate that a lender may charge. The ceiling is the lower of 21 percent of the entire unpaid balance, or 36 percent on the first $300 of unpaid principal, 21 percent on the next $700, and 15 percent on the remainder. § 24-4.5-3-508. (There is an exception, inapplicable to this case, for payday loans. § 24-4.5-7-101 *et seq.*) A lender required to have a license who fails to obtain it or violates any of the statutory restrictions exposes himself to a variety of administrative and civil remedies. §§ 24-4.5-6-108, 24- 4.5-6-110, 24-4.5-6-113. The failure to obtain a license also voids the loan—the borrower doesn't have to repay even the principal. And a borrower who has paid finance charges in excess of those

permitted by the code is entitled to a refund. § 24-4.5-5-202.

Midwest Title is what is known as a "[car] title lender." "Cash loans, variously called car title pawn, car title loans, title pledge loans, or motor vehicle equity lines of credit, are the latest, fast-growing form of high cost, high risk loans targeting cash strapped American consumers. Storefront and online lenders advance a few hundred to a few thousand dollars based on the titles to paid-for vehicles. Loans are usually for a fraction of the vehicle's value and must be repaid in a single payment at the end of the month. Loans are made without consideration of ability to repay, resulting in many loans being renewed month after month to avoid repossession. Like payday loans, title loans charge triple digit interest rates, threaten a valuable asset, and trap borrowers in a cycle of debt." Jean Ann Fox & Elizabeth Guy, "Driven into Debt: CFA Car Title Loan Store and Online Survey," p. 1 (Nov. 2005), www.consumerfed.org/pdfs/Car_Title_Loan_Report_111705.pdf (visited Dec. 4, 2009); see also Michael S. Barr, "Banking the Poor," 21 *Yale J. Reg.* 121, 164-66 (2004).

Until it received a letter in August 2007 from Indiana's Department of Financial Institutions advising it of the addition of the territorial-application provision to the code, Midwest had made title loans to Hoosiers (as Indianans like to call themselves) at annual percentage interest rates almost ten times higher than the maximum permitted by the code. They had a maturity of 12 to 24 months, were secured by the title to the

borrower's motor vehicle, and were for no more than half the vehicle's estimated wholesale value. The loans were made only in person, at Midwest's offices in Illinois—it had no offices in Indiana. The loan would be in the form of a cashier's check payable to the borrower, drawn on an Illinois bank. The borrower was required to hand over a set of his car keys at the closing to enable Midwest to exercise self-help repossession of the car in the event of a default, so that it wouldn't have to go to court to enforce its lien should the borrower default. (In this respect, title lending is like pawnbroking—hence the alternative name "car title pawns.") A suit to enforce the lien would be infeasible because of the small size of the loans relative to the costs of litigation.

Midwest would notify the Indiana Bureau of Motor Vehicles of the loan as soon as it was made, so that it would be noted on the official record of the borrower's title, thus protecting Midwest's rights as a creditor from subsequent creditors to whom the debtor might grant a security interest in the vehicle. Repossessions occurred, naturally, in Indiana. Midwest would arrange with an Indiana firm to auction off the repossessed vehicle, and the auction would be held in Indiana.

Midwest advertised the loans on Indiana television stations and through direct mailings to Indiana residents. In 2006 it made more than two thousand such loans to Hoosiers, amounting to 9 percent of its loans that year. The two states adjoin and many Hoosiers live within a short drive, or even a walk, of Illinois. Ten of Midwest's 23 offices in Illinois are within approximately 30 miles of the

Indiana border. Midwest discontinued its lending to residents of Indiana when it received the notice that the Indiana code applied to that lending.

The state asserts an interest in protecting its residents from what it describes as "predatory lending." There is a considerable body of thought that many consumers are incapable of making sensible decisions about credit. E.g., Oren Bar-Gill & Elizabeth Warren, "Making Credit Safer," 157 *U. Pa. L. Rev.* 1, 44-45 (2008); Paige Marta Skiba & Jeremy Tobacman, "Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default" (2008), http://bpp.wharton.upenn.edu/tobacman/papers/payday.pdf (visited Dec. 4, 2009); Ronald J. Mann & Jim Hawkins, "Just Until Payday," 54 *UCLA L. Rev.* 855, 881-82 (2007); Amanda Quester & Jean Ann Fox, "Car Title Lending: Driving Borrowers to Financial Ruin," pp. 6-7, Apr. 2005, www.consumerfed.org/pdfs/driving_borrowers_rpt.pdf (visited Jan. 13, 2010); Lynn Drysdale & Kathleen E. Keest, "The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenges to Current Thinking About the Role of Usury Laws in Today's Society," 51 *S. Car. L. Rev.* 589, 605-10 (2000). According to this literature, many consumers can't make sense of the interest rates and other fees charged by loan companies, in part because of the complexity of most loan documents. They end up paying absurdly high rates when they could borrow at much lower rates from a bank or, without having to borrow at all, could draw upon savings that earn low interest. Many of the borrowers, lacking self-control—but unaware of this and therefore unable to

take countermeasures—are incapable of moderating their desire for goods and services and end up overindebted.

The literature is mainly about payday loans but appears applicable to title loans as well. (See the articles by Fox & Guy and by Barr.) These and related forms of lending have been called "fringe banking," Ronald Paul Hill, "Stalking the Poverty Consumer: A Retrospective Examination of Modern Ethical Dilemmas," 37 *Journal of Business Ethics* 209, 214-15 (2002), but the pathologies identified in the literature may extend to more conventional forms of credit transactions. Bar-Gill & Warren, *supra*, 157 *U. Pa. L. Rev.* at 26-43; Oren Bar-Gill, "Seduction by Plastic," 98 *Nw. U. L. Rev.* 1373, 1375-76, 1395-1401 (2004). Congress is considering enacting a statute, proposed by the Treasury Department, that would create a federal Consumer Financial Protection Agency empowered to adopt regulations designed not only to prevent outright fraud in credit transactions but also to protect consumers of financial products from their cognitive limitations, limitations emphasized by behavioral economists. Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (July 8, 2009); Adam J. Levitin, "The Consumer Financial Protection Agency," *Am. Bankr. Inst. J.*, Oct. 2009, pp. 10, 66-67; Joshua D. Wright & Todd J. Zywicki, "Three Problematic Truths About the Consumer Financial Protection Agency Act of 2009," *Lombard Street*, Sept. 14, 2009, pp. 29, 30-31; Editorial, "The State of Financial Reform," *New York Times*, Oct. 25, 2009, p. 7.

A contrary school of thought points out that people who cannot borrow from a bank because they have poor credit may need a loan desperately. If a ceiling is placed on interest rates, these unfortunates may be unable to borrow because the ceiling may be too low for the interest rate to compensate the lender for the risk of default. As a result, they may lose their house or car or other property or find themselves at the mercy of loan sharks. See Todd J. Zywicki, "Consumer Welfare and the Regulation of Title Pledge Lending," Mercatus Center Working Paper No. 09-36 (Sept. 2009), www.mercatus.org/sites/default/files/publication/WP0936_Consumer_Welfare_and_Regulation_of_Title_Pledge_Lending.pdf (visited Dec. 4, 2009); Jonathan Zinman, "Restricting Consumer Credit Access: Household Survey Evidence on Effects Around the Oregon Rate Cap," 34 *J. Banking & Finance* (forthcoming 2010); Donald P. Morgan & Michael R. Strain, "Payday Holiday: How Households Fare after Payday Credit Bans" (Federal Reserve Bank of New York Staff Reports No. 309, Feb. 2008), http://ftp.ny.frb.org/research/staff_reports/sr309.pdf (visited Dec. 4, 2009); Mann & Hawkins, *supra*, 54 *UCLA L. Rev.* at 884-94 (2007); Gregory Elliehausen, "Consumers' Use of High-Price Credit Products: Do They Know What They Are Doing?" (Networks Financial Institute Working Paper No. 2006- WP-02, May 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921909) (visited Dec. 4, 2009). An annual interest rate of 300 percent is astronomical. But a person who borrows $5,000 at that rate and repays it two weeks later pays only $577 in interest, and the loan may have enabled him

to avert foreclosure on his house, or some other dire event that would have cost him more than $577.

Against this benign view of "fringe banking" it has been argued that many of the borrowers end up rolling over their loans from month to month, which runs counter to the theory that these are short-term loans rationally incurred, despite their high cost, as a temporary response to unexpected setbacks. See Michael A. Stegman & Robert Faris, "Payday Lending: A Business Model That Encourages Chronic Borrowing," 17 *Economic Development Quarterly* 8, 19-21 (2003); Quester & Fox, *supra*, at 6-7; Drysdale & Keest, *supra*, 51 *S. Car. L. Rev.* at 605-10; and the passage quoted earlier from Fox & Guy.

We need not take sides in the controversy over the merits of "fringe banking." It is enough that Indiana has a colorable interest in protecting its residents from the type of loan that Midwest purveys.

Article I, § 8, cl. 8 of the Constitution, which provides so far as bears on this case that "Congress shall have Power . . . to regulate Commerce . . . among the several States," has been interpreted to bar states from establishing tariff walls or other harmful barriers to trade across state lines. E.g., *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192-94 (1994); *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 280-87 (1987); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521-23 (1935) (Cardozo, J.). This interpretation is controversial, in part because it seems to do violence to the language

of the clause. But it does not. The clause is ambiguous. If emphasis is placed on the first word—"Congress shall have Power"—the clause implies that the states shall not have the power to regulate commerce. Because of the politics and workload of Congress, unless the courts recognized and enforced the exclusive federal power to regulate commerce the nation would be riddled with state tariffs; and a nation with internal tariff barriers is hardly a nation at all.

Tariffs seek to protect local producers from competition. Indiana, however, isn't trying to protect its title lenders from the competition of title lenders in other states. The territorial-application provision does not make Indiana law treat a title lender located in another state, such as Midwest, any worse than it treats Indiana lenders. All are subject to the same interest-rate ceilings and other strictures of the consumer credit code. But as the case law has long recognized, the commerce clause can be violated even when there is no outright discrimination in favor of local business. An earlier case of ours gave the example of "a severance tax on a raw material, such as oil or coal, of which the state (perhaps in conjunction with other states) has a monopoly or near monopoly and which is almost entirely exported rather than consumed locally. The incidence of the tax will fall on the consumers in other states, who have no voice in the politics of the producing state, and the result may be a level of taxation and resulting price to consumers that greatly exceeds the cost of the services that the state provides to producers of the raw material and that by doing so burdens the export of the raw material to other

states." *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 555 (7th Cir. 2007). In such a case, where the regulation is local but the consequences felt elsewhere, we explained that a plaintiff "has a steep hill to climb. 'Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (emphasis added); see also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-74 (1981)." See also *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986); *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1130-32 (7th Cir. 1995).

But another class of nondiscriminatory local regulations is invalidated without a balancing of local benefit against out-of-state burden, and that is where states actually attempt to regulate activities in other states. "The Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Healy v. Beer Institute*, 491 U.S. 324, 337 (1989); see also *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, *supra*, 476 U.S. at 582-84; *Baldwin v. G.A.F. Seelig, Inc.*, *supra*, 294 U.S. at 521; *Dean Foods Co. v. Brancel*, 187 F.3d 609, 614-20 (7th Cir. 1999); *Morley-Murphy Co. v. Zenith Electronics Corp.*, 142 F.3d 373, 378-80 (7th Cir. 1998); *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 62-64 (1st Cir. 2008); *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of North*

America, Inc., 492 F.3d 484, 488-90 (4th Cir. 2007); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 239-41 (4th Cir. 2004); *American Booksellers Foundation v. Dean*, 342 F.3d 96, 102-04 (2d Cir. 2003); *National Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 638-40 (9th Cir. 1993); cf. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 570-73 (1996).

In *Healy*, Connecticut had passed a "price affirmation" law that required brewers to commit that the prices they charged for beer in Connecticut were no higher at the time of posting than the lowest prices charged in any state that bordered Connecticut. There was no discrimination in favor of Connecticut brewers, because there were no Connecticut brewers. Nevertheless the Supreme Court invalidated the law. A brewer might sell beer in New York and Connecticut and charge a higher price in Connecticut because the people of that state liked its beer more than New Yorkers did. Faced with the Connecticut price-affirmation law and viewing Connecticut as its more valuable market, the brewer might decide to raise its price in New York to the level of its price in Connecticut rather than reducing its Connecticut price. The state would thus be regulating prices in another state, albeit indirectly. Commerce would be impeded if states could regulate commercial activities in other states. The Court held that Connecticut's law violated the commerce clause

The present case is both stronger and weaker for Midwest than *Healy* was for the Beer Institute. It is stronger because the effect of the territorial-application provision on an out-of-state business

selling to customers in that state is more direct than in *Healy*; the provision forbids the making of title loans in Illinois to residents of Indiana on the terms agreed to by the parties. It is weaker because there is no interference with transactions with residents of another state—but that cannot be a complete defense. Suppose Indiana decided that gambling had become a serious problem for its residents—many of them were becoming addicted and this was leading to bankruptcies that were playing havoc with family life and the Indiana economy. And so it decided to ban casinos in the state and to require casinos in all other states, if they wanted to do business with residents of Indiana, to obtain a license from Indiana that would forbid their allowing a Hoosier to bet more than $10 a day in a casino. A state law of that kind, however well intentioned and genuinely beneficial to the state imposing it, would burden interstate commerce by restricting travel and a firm's ability to deal with residents of a different state, even though the law treated out-of-state businesses no worse (in our example, even slightly better) than businesses located in the state. In *Quill Corp. v. North Dakota*, 504 U.S. 298, 314-18 (1992), the Supreme Court held that a state whose residents purchased by mail from sellers who had no office in the state could not require the seller to collect the use tax that the state imposed on sales to its residents. That is an example of extraterritorial regulation held to violate the commerce clause even though the entity sought to be regulated received substantial benefits from the regulating state, just as Indiana's regulation of Illinois lenders furthers a

local interest—the protection of gullible or necessitous borrowers.

This case may seem less extreme than our hypothetical case of the gambling law. But that is only because the parties have chosen to focus on the single out-of-state firm that happens to be the plaintiff, and the firm operates in a neighboring state, unlike a casino in Nevada. Illinois is not the only state that borders on Indiana, however. Title lenders in all four states contiguous to Illinois may decide not to seek an Indiana license but instead just to stop doing business with residents of Indiana, as Midwest has done even though they account for a significant part of the business of its Illinois offices.

Should we worry that Midwest may have distorted the ordinary mode of doing business in its industry in order to be able to invoke the constitutional prohibition of extraterritorial state regulation? Might not Midwest, were it not maneuvering to come under the umbrella of *Healy*, have opened offices in Indiana to serve its numerous Indiana customers? Had it done so, it would have come within the reach of the Indiana law without reference to the territorial-application provision.

But against this surmise is the fact that Midwest's practice of serving its Indiana customers exclusively from offices located in Illinois predated Indiana's attempt to apply its consumer credit code extraterritorially. Midwest prefers to deal with its customers face to face so that it can size them up, inspect the car, and check that the car keys that the customer gives it really are the keys for that car.

Since so many Hoosiers live within a stone's throw of Chicago, Midwest felt no need to establish separate offices across the state line. There may also be aspects of Indiana law unrelated to its consumer credit code that deterred Midwest from opening any offices in the state.

There is no suggestion that Midwest located its offices in Illinois where it did in order to poach Hoosiers. It's not as if the offices are in parts of eastern Illinois in which the only consumer concentrations are in Indiana. Eight of Midwest's ten Illinois stores that are closest to the Indiana state line are in the Chicago metropolitan area. And it's not as if Midwest had been an Indiana firm operating only in Indiana, had relocated to Illinois, just across the border, when the territorial-application provision was enacted, and had continued to lend to residents of Indiana.

"Generally speaking," the Supreme Court said in *Healy*, "the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." 491 U.S. at 336-37; see also *Morley-Murphy Co. v. Zenith Electronics Corp.*, *supra*, 142 F.3d at 378-80; *National Collegiate Athletic Ass'n v. Miller*, *supra*, 10 F.3d at 638-40. True, a couple of cases in other circuits suggest that the only relevant inconsistency is placing a firm under "inconsistent obligations." *Pharmaceutical Research & Manufacturers of America v. Concannon*, 249 F.3d 66, 82-83 (1st Cir. 2001); see also *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 826 (3d Cir. 1994). And that is not the situation

here; Midwest can comply with Indiana's consumer credit code without (so far as appears) violating the law of Illinois or any other state. But we took a broader view of inconsistent state policies in the *Morley-Murphy* case and we must do so in this one. Suppose Illinois thinks title loans a good thing (and there is, as we pointed out earlier, some basis for that belief)—or at least, as the absence of an Illinois counterpart to the Indiana law makes clear, thinks they shouldn't be restricted in the way that Indiana thinks they should be. To allow Indiana to apply its law against title loans when its residents transact in a different state that has a different law would be arbitrarily to exalt the public policy of one state over that of another.

Indiana points out that despite this arguable symmetry of state interests, its interest in regulating credit may be great enough to allow its courts to apply its credit law should Midwest sue a defaulting Indiana borrower in an Indiana court. Not that such suits are likely. The loans are too small to justify the expense of suits to collect them if there is a default; hence the importance to Midwest of self-help repossession. Midwest has yet to sue any of its title borrowers. But if there were a suit, an Indiana court might rule that Indiana had the "most intimate contacts" with the transaction and therefore that its law applied even though the loan had been made in Illinois. See, e.g., *OVRS Acquisition Corp. v. Community Health Services, Inc.*, 657 N.E.2d 117, 124 (Ind. App. 1995); *Dohm & Nelke v. Wilson Foods Corp.*, 531 N.E.2d 512, 513 (Ind. App. 1988); *Eby v. York-Division*, 455 N.E.2d 623, 626 (Ind. App. 1983). Or it might rule that Illinois's failure to limit the

interest rates in title loans was so offensive to the public policy of Indiana that the Illinois law would not be enforced in Indiana—in which event the Indiana courts might refuse to apply Illinois law even if Midwest's contracts contained a choice of law clause directing that Illinois law govern a suit arising from the contract—which they do. *Moll v. South Central Solar Systems, Inc.*, 419 N.E.2d 154, 162 (Ind. App. 1981); *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 132-33 (7th Cir. 1990) (Indiana law). In short, "a particular set of facts giving rise to litigation [can] justify, constitutionally [that is, under the due process clause], the application of more than one jurisdiction's laws." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-19 (1985); see also *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307-13 (1981) (plurality opinion).

But if the presence of an interest that might support state jurisdiction without violating the due process clause of the Fourteenth Amendment dissolved the constitutional objection to extraterritorial regulation, there wouldn't be much left of *Healy* and its cognates. Connecticut had an interest in the price of beer to its residents, but that didn't save its statute from being held to violate the commerce clause. Wisconsin had an interest in preventing its dairy farmers from obtaining "unjustified" volume discounts from food processors in Illinois, yet we invalidated the prohibition in *Dean Foods Co. v. Brancel*, *supra*, even though, while the aim of the Wisconsin law was to protect small dairy farms from the competition of large ones, the law did not discriminate against out-of-state farmers or

processors. See also *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of North America, Inc.*, *supra*.

The concerns behind the due process and commerce clauses are different. *Quill Corp. v. North Dakota*, *supra*, 504 U.S. at 312-13. The former protects persons from unreasonable burdens imposed by government, including extraterritorial regulation that is disproportionate to the governmental interest. The latter protects interstate commerce from being impeded by extraterritorial regulation. And imposing a state's law on transactions in another state has a greater extraterritorial effect (and greater effect on commerce) than the state's applying its own law to suits in its courts. The difference is especially pronounced in this case, since quite apart from Indiana's consumer credit code Midwest has no intention of suing defaulting debtors in Indiana or anywhere else. Maybe someday it will bring such a suit for the *in terrorem* effect; or maybe someday one of its debtors will sue it. But that potential for state judicial interference with Midwest's transactions is trivial in comparison to the interference created by the application of Indiana's law to every loan that Midwest might make to a resident of Indiana.

The interference was with a commercial activity that occurred in another state. Each title loan that Midwest made to a Hoosier was in the form of a check, drawn on an Illinois bank, that was handed to the borrower at Midwest's loan office and could be cashed there. Illinois was also where the conditional transfer of title to the collateral was made (the handing over of the keys—the "pawn"), and where

the payments required by the loan agreement were received by Midwest. The contract was, in short, made and executed in Illinois, and that is enough to show that the territorial-application provision violates the commerce clause. Of course the loan proceeds were probably spent largely in Indiana, but the same would be true of the winnings of a Hoosier at a Nevada casino. The consequences of a commercial transaction can be felt anywhere. But that does not permit New York City to forbid New Yorkers to eat in cities in other states that do not ban trans fats from their restaurants.

Our conclusion is not altered by the fact that Midwest advertises in Indiana. If Indiana cannot prevent Midwest from lending money to Hoosiers in Illinois, it cannot prevent Midwest from truthfully advising them of this opportunity. A state may not "take the commercial speech that is vital to interstate commerce and use it as a basis to allow the extraterritorial regulation that is destructive of such commerce." *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of North America, Inc.*, *supra*, 492 F.3d at 491; cf. *Dean Foods Co. v. Brancel*, *supra*, 187 F.3d at 618-19.

Nor is the location of the collateral in Indiana a critical difference between this case and the other cases that have invalidated extraterritorial regulations. It just illustrates that a transaction made in one state can have repercussions in another. A firecracker bought by an Illinoisan in Indiana could cause an injury to the purchaser in Illinois. That would allow an Illinois court, in a suit by the injured purchaser against the Indiana seller, to

apply its own law. But it would not allow Illinois to forbid Indiana to sell firecrackers to residents of Illinois in Indiana merely because Illinois forbids firms in Illinois to sell firecrackers and thus would not be discriminating against an out-of-state business. A contract can always go wrong and if it does the consequences will often be felt in a different state from the one in which the contract was made and executed.

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FINAL JUDGMENT

January 28, 2010

BEFORE: RICHARD A. POSNER, Circuit Judge
JOEL M. FLAUM, Circuit Judge
SAMUEL DER-YEGHIAYAN, District Court Judge*

No.: 09-2083	MIDWEST TITLE LOANS, INC., Plaintiff - Appellee v. DAVID H. MILLS, In His Official Capacity as Director of the Indiana Department of Financial Institutions, Defendant - Appellant
Originating Case Information:	
District Court No: 1:07-cv-01479-SEB-DML Southern District of Indiana, Indianapolis Division District Judge Sarah Evans Barker	

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

*Hon. Samuel Der-Yeghiayan of the Northern District of Illinois, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MIDWEST TITLE LOANS, INC.,	)	
Plaintiff,	)	
vs.	)	1:07-cv-1479-SEB-DML
JUDITH J. RIPLEY, In Her Official Capacity as Director of the Indiana Department of Financial Institutions,	)	
Defendant.	)	

CORRECTED ENTRY GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION[1]

This cause is before the Court on Plaintiff Midwest Title Loans, Inc.'s ("Midwest Title") Motion for Summary Judgment and Permanent Injunction [Docket No. 38], filed on March 24, 2008; and Defendant Judith J. Ripley's cross motion for

[1] This entry is being reissued because the pages in the previous version of the entry were out of order. This corrected entry makes no substantive changes and is identical to the entry issued on March 24, 2009. All dates related to appeals and other procedures remain unchanged.

Summary Judgment [Docket No. 42], filed on March 24, 2008. Midwest Title brought its complaint, pursuant to 42 U.S.C. § 1983, against Defendant, Judith J. Ripley, in her official capacity as Director of the Indiana Department of Financial Institutions ("IDFI"), seeking to enjoin Ms. Ripley from enforcing the Indiana Uniform Consumer Credit Code, Ind. Code § 24-4.5-1-101 to 24-4.5-7-212 (the "IUCCC"), against Midwest Title. Plaintiff filed its action following receipt of a cease-and-desist letter issued by the Supervisor of the IDFT Consumer Credit Division charging Midwest Title with being in violation of the IUCCC. Plaintiff asserts that, under Seventh Circuit and Supreme Court precedent, Defendant is forbidden by the Commerce Clause of the United States Constitution (Art. I, § 8) from applying the IUCCC extraterritorially to an Illinois Business.[2]

For the reasons detailed below, Plaintiff's Motion for Summary Judgment and Permanent Injunction is GRANTED, and Defendant's Motion for Summary Judgment is DENIED.

Factual Background

[2] On March 24, 2008, the parties stipulated to the dismissal, with prejudice, of Count II of Plaintiff's Complaint [Docket No. 37]. That portion of the Complaint requested declaratory and injunctive relief and alleged that the IUCCC discriminated against "companies such as Plaintiff that are not affiliated with Indiana industrial loan and investment companies." Compl. at ¶ 31. We accepted that stipulation in a signed Order entered on March 25, 2008 [Docket No. 44].

Plaintiff Midwest Title is an Illinois business corporation licensed by the Illinois Department of Financial Institutions as a consumer installment loan company. Stip. at ¶ 1. Defendant Judith Ripley is chief executive and administrative officer of the Indiana Department of Financial Institutions ("IDFI"). Id. at ¶ 3.

Plaintiff issues consumer loans, which are secured by the borrower's motor vehicle, and operates exclusively from 23 separate locations throughout the state of Illinois. Plaintiff has no business locations within Indiana. Id. at ¶¶ 1-2; 4. Plaintiff does not own or lease property in Indiana and does not hold a certificate of authority or license to do business in Indiana. Id. at ¶ 9. The parties agree that no Midwest Title agent or employee solicits business *in person* in Indiana, and all reminder and collection calls to Indiana borrowers are made from Plaintiff's Illinois-based offices. Id. at ¶ 8. However, Plaintiff does solicit business from Indiana consumers via other means. See id. at ¶ 8.

The parties have stipulated to certain uncontested facts [see Docket No. 39 (Designation of Evidence in Support of Plaintiff's Motion for Summary Judgment, Pl.'s Exh. 1); Docket No. 43 (Designation of Evidence in Support of Defendant's Motion for Summary Judgment, Def.'s Exh. A)]. The following material facts are lifted from those stipulations or are otherwise undisputed:

Prior to August 2007, Midwest Title accepted in-person applications for loans from Indiana residents. To apply, an applicant drove his motor vehicle and

certificate of title to one of Midwest Title's Illinois locations. If approved, the applicant executed the necessary loan documents at the Illinois location and provided Midwest Title with a set of keys to the vehicle to secure the loan.[3] Stip. at ¶ 8(a). Midwest Title would then submit the necessary documentation to the Indiana Bureau of Motor Vehicles to have its lien noted on the borrower's certificate of title. Id. at ¶ 8(f). Loan funds were disbursed in person to the borrower at the Illinois business location. Borrowers could make principal and interest payments at any Midwest Title location in Illinois. Payments were also accepted via money order or certified check transmitted through U.S. mail, by credit card, or through Western Union. Id. at ¶ 8(a), (g).

Plaintiff admits that it engaged in advertising and solicitation activities targeting Indiana customers. Plaintiff made annual mailings to Indiana residents who had previously used its services, with the effect of soliciting repeat business from those customers. Id. at ¶ 8(b). Plaintiff further admits to advertising on television stations in Indianapolis and Terre Haute, Indiana, and on Chicago-based television and radio stations that reached Indiana residents. Id. at ¶ 8(c). In addition,

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[3] This enabled Midwest Title to engage in self-help repossession in the event of an uncured default by the borrower. Stip. at ¶ 8(a). On occasion, Plaintiff contracted with an unaffiliated third-party repossession company to repossess vehicles licensed in the state of Indiana. Prior to judicial sale, such vehicles were stored in Indiana and sold through an unaffiliated Indiana auction house. Id. at ¶ 8(h).

Plaintiff was listed in the Yellow Pages telephone directory in some Indiana communities. Id. at ¶ 8(d).

In August 2007, Plaintiff received a letter from the IDFI informing the company of a recent amendment, the "Territorial Application Provision," to the IUCCC. Stip. at ¶ 5, 10. As amended, the IUCCC imposes Indiana licensing and regulatory requirements on lenders "who are soliciting by any means and then making consumer loans to Indiana residents . . . " IND. CODE § 24-4.5-1-201. For purposes of the Territorial Application Provision, a sale, lease, or loan transaction occurs in Indiana "if a consumer who is a resident of Indiana enters into a sale, lease, or loan transaction with a creditor in another state *and the creditor has advertised or solicited sales, leases, or loans in Indiana* by any means, including by mail, brochure, telephone, print, radio, television, the Internet, or electronic means . . ." IND. CODE § 24-4.5-1-201(d) (emphasis added). The letter noted that if a creditor violates this provision, "the loan is void and the debtor is not obligated to pay either the principal or loan finance charge, as set forth in IC 24.4.5-5.202."[4] IND. CODE § 24-4.5-1-201(8). Finally, IDFI warned Plaintiff that "failure to comply with Indiana law concerning loans made to Indiana residents could subject your company to regulatory enforcement by the office of the Indiana Attorney General and raise possible civil claims by customers." Stip. at ¶ 10. The parties agree that while the letter does not explicitly say so, "it is the position of the Director that the IUCCC does not

[4] These provisions became effective on July 1, 2007. Stip. at ¶ 10.

apply to a loan consummated in a face-to-face meeting outside Indiana unless the loan resulted from either a solicitation received by the borrower in Indiana or media advertising originating in Indiana." Id. at ¶ 11.

Upon receipt of the warning letter, Plaintiff immediately suspended offering loans to Indiana residents. Id. at ¶ 12. Plaintiff also stopped charging and collecting interest on loans made to Indiana borrowers between July 1, 2007, and Plaintiff's receipt of the letter, and refunded all previously made payments of interest on the covered loans. Id. at ¶ 13.

Plaintiff extended a total of 2,054 loans to Indiana borrowers in 2006, which represented approximately 9 percent of Plaintiff's business. Id. at ¶ 6, Pl.'s Br. in Supp. at 2. The interest rate charged by Plaintiff exceeds the 36 percent per annum limit allowed by the IUCCC, Stip. at ¶ 4; therefore, the loans do not comply with Indiana law.

Legal Analysis

I. Standard of Review

Summary judgment is appropriate when the record establishes that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Disputes concerning material facts are genuine where the evidence is such that a reasonable jury could return a verdict for the non-

moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In deciding whether genuine issues of material fact exist, the court construes all facts in a light most favorable to the non-moving party and draws all reasonable inferences in favor of the non-moving party. See id. at 255. However, neither the "mere existence of some alleged factual dispute between the parties," id. at 247, nor the existence of "some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986), will defeat a motion for summary judgment. Michas v. Health Cost Controls of Illinois, Inc., 209 F.3d 687, 692 (7th Cir. 2000).

The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. The party seeking summary judgment on a claim on which the non-moving party bears the burden of proof may discharge its burden by showing an absence of evidence to support the non-moving party's case. Id. at 325.

When the issues presented are purely questions of law, as the case at bar, summary judgment standards nonetheless apply. See Oneida Tribe of Indians of Wisconsin v. State of Wisconsin, 951 F.2d 757, 760 (7th Cir. 1991). Courts are often confronted with cross-motions for summary judgment because Rules 56(a) and (b) of the Federal Rules of Civil Procedure allow both plaintiffs and defendants to move for such relief. "In such situations, courts must

consider each party's motion individually to determine if that party has satisfied the summary judgment standard." Kohl v. Ass'n. of Trial Lawyers of Am., 183 F.R.D. 475 (D.Md.1998). While cross motions for summary judgment may lead to a judgment without trial, the standard for determining whether summary judgment should issue is unchanged from that which applies when only a single party has moved for the relief.

II. Dormant Commerce Clause:

The Territorial Application Provision of the IUCCC provides that Indiana law applies to any transaction in which "a consumer who is a resident of Indiana enters into a sale, lease, or loan transaction with a creditor in another state *and the creditor has advertised or solicited sales, leases, or loans in Indiana* by any means, including by mail, brochure, telephone, print, radio, television, the Internet, or electronic means . . ." IND. CODE § 24-4.5-1-201(d) (emphasis added). Plaintiff contends that this amendment violates the Commerce Clause of the United States Constitution by attempting to impose an extraterritorial regulation on commerce conducted lawfully in Illinois. Compl. at 8-9. Plaintiff claims that, because Indiana is attempting to apply the IUCCC to contracts made wholly outside the state, the Territorial Application Provision is *per se* invalid. Pl.'s Br. in Supp. at 8-15. Plaintiff seeks both declaratory and injunctive relief.

Defendant rejoins that the Indiana statutory scheme is not triggered unless a lender affirmatively targets Indiana consumers by advertising or

soliciting in Indiana, and that, because Plaintiff solicits business across state lines, the loans in question are not transacted "wholly" within Illinois. Def.'s Br. in Supp. at 16. Defendant argues that the purpose of the Territorial Application Provision is to "protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit," and that a socially protective legislative purpose, as opposed to economic protectionism, is permissible, even if it imposes an incidental burden on interstate commerce. Id. at 18. Defendant further maintains that the facts stipulated by the parties "readily acknowledge a number of [Midwest Title's] activities which have a nexus with Indiana." Id. at 8. Specifically, Defendant asserts that by directing mailings to Indiana consumers, advertising on radio and television stations located in Indianapolis and Terre Haute, and paying to have its name listed in the Yellow Pages in Indiana, "Midwest Title has invoked Indiana's consumer protection laws." Id. at 9. Defendant thus urges us to apply the balancing test of Pike v. Bruc Church, 397 U.S. 137 (1970), to Plaintiff's Dormant Commerce Clause challenge and uphold the Territorial Application Provision of the IUCCC.

The United States Constitution allocates to Congress the power to "regulate Commerce . . . among the several States." U.S. Const. Art I, § 8. Implicit in Congress's exclusive authority over interstate commerce is a restriction on states from doing the same. See New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988). This prohibition is commonly referred to as the Dormant Commerce

Clause. Intended to prevent economic protectionism, the Dormant Commerce Clause prohibits "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors . . . Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism . . . . " Id. at 273-74.

Laws motivated by simple economic protectionism are *per se* invalid. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Under certain circumstances, however, a statute which merely burdens interstate commerce in the course of advancing a legitimate state interest may be upheld if the state interest outweighs the burden on interstate commerce. Pike, 397 U.S. 137.

A. The Extraterritoriality Principle:

States may also run afoul the Commerce Clause by seeking to regulate commerce which takes place "wholly" outside their own state. Healy v. Beer Inst., 491 U.S. 324, 332 (1989) ("[A] state law that has the 'practical effect' of regulating commerce occurring wholly outside the state's borders is invalid under the Commerce Clause."); Dean Foods Co. v. Brancel, 187 F.3d 609, 614 (7th Cir. 1999) (stating that it is "a fact well known" that extraterritorial legislation is barred by the federal constitution); Nat'l Solid Waste Mgmt. Ass'n v. Meyer, 63 F.3d 652 (7th Cir. 1995) ("[T]he Commerce Clause constrains a state from projecting its economic legislation onto commerce wholly occurring in its sister states."). The parties'

dispute, appropriately framed, is whether the loans offered by Midwest Title constitute commerce "wholly outside" the state of Indiana, thus implicating the Dormant Commerce Clause.[5]

In support of its argument, Plaintiff cites Dean Foods, stating that "Indiana's aggressive effort to assert the IUCCC extraterritorially to govern Midwest Title's business activities in Illinois cannot be harmonized" with that decision. Pl.'s Br. in Supp. at 9.

Dean Foods involved a Wisconsin law that attempted to prohibit an Illinois milk processor from paying price premiums to high-volume Wisconsin milk producers. Prior to the enactment of the Wisconsin law, the Illinois processor hired haulers to go to Wisconsin, purchase Wisconsin milk, and transport the milk to Illinois for processing. Dean Foods, 187 F.3d at 611-12. When the law passed, the Illinois processor altered its operations in an effort to avoid the law by requiring Wisconsin milk producers to transport their own milk to Illinois, where the Illinois processor would agree to purchase it and accept delivery. Id. Wisconsin attempted to enforce its new pricing regulations on the transactions

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[5] Notably, a few commentators have questioned whether the Extraterritoriality Principle is appropriately considered an outgrowth of the Commerce Clause. See Peter C. Felmly, Comment, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial Legislation, and the Concerns of Federalism*, 55 ME. L. REV. 467 (2003); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865 (1987).

despite the Illinois' processors' attempts around it. Dean Foods filed an action in federal court, arguing that Wisconsin's actions amounted to unconstitutional extraterritorial interference.

Even though Dean Foods maintained a sales office in Wisconsin, mailed business solicitations to Wisconsin customers, and had its representatives "enroll" Wisconsin producers in the new milk purchase program in Wisconsin, id. at 618-19, the Seventh Circuit nonetheless held that the actual milk sales took place wholly outside Wisconsin, no contracts were formed in Wisconsin, and no commitment bound the Illinois processor and Wisconsin producers before the milk was accepted in Illinois. Id. at 619. The Seventh Circuit concluded that mere contacts with another state are not enough to overcome the ban on extraterritorial legislation. Id. at 618-19. Rather, an element of the actual contract formation must occur within a state for that contract to come within the purview of the state's laws. Id. at 620.

The Dean Foods analysis focused particularly on the elements of contract formation in determining whether transactions occurred wholly within the state of Illinois. The court indicated that the crucial contacts are those which form a binding agreement: offer and acceptance of specific terms. Id. at 617, 619-20. If an offer occurs in one state and an acceptance in another, both states' laws may apply. Id. at 620. However, where the entire transaction occurs wholly within one state, only that state's laws may apply. Id. Advertising, and even preliminary

negotiations in another state, are not enough to invoke that state's laws. Id. at 619.

Other courts have applied a similar analysis. The Fourth Circuit recently considered a case, Carolina Trucks & Equip. Inc. v. Volvo Trucks of N. Am., Inc., 492 F.3d 484 (4th Cir. 2007), where South Carolina sought to regulate transactions in which residents of South Carolina traveled to a Georgia dealership to purchase trucks. The offending Georgia dealership was listed in the Yellow Pages in South Carolina, advertised in regional trade publications, and mailed brochures to individuals in South Carolina. Id. at 487. All actual sales transactions, however, occurred on the dealership lot in Georgia. Id. The court held that advertising in South Carolina was insufficient to subject the challenged transactions to South Carolina law, stating that "[o]ne state may not 'project its legislation' into another." Id. at 489 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935)). The court explicitly rejected the argument that the transactions took place partially in South Carolina by virtue of the advertising solicitations sent there. Id. 490-91.[6]

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[6] In the present case, Defendant alternatively argues that elements of the loan agreement are performed in Indiana because Indiana consumers may mail their payments from Indiana and have an ongoing relationship with Midwest Title. Def.'s Reply to Subm. at 5, 10-11 [Docket No. 55]. We find this argument unavailing. We doubt, for instance, the Fourth Circuit's analysis in Carolina Trucks would have substantially changed if South Carolina customers financed their truck purchases and mailed payments from their home state.

Most recently, in Quick Payday Inc. v. Stork, 549 F.3d 1032 (10th Cir. 2008), the Tenth Circuit considered the application of a Kansas regulation on an out-of-state payday loan company who solicited business in Kansas via the internet. Quick Payday is of particular relevance to our case, because the Kansas Office of the State Bank Commission sought to apply the KUCCC based on a territorial application provision, KAN. STAT. ANN. § 16a-1-201(1)(b), which is remarkably similar to the Indiana provision at issue in our case.[7] The solicitation in question involved the lender web site, which could be accessed by Kansas residents in Kansas, as well as emails sent directly to prospective borrowers in Kansas.

In Quick Payday, Tenth Circuit adopted the view that "the borrower's physical location at the time of the solicitation is controlling." 549 F.3d at 1308. The Defendant in our case vigorously maintains that this language indicates that the solicitation is part of a loan transaction, and that if a consumer is within Indiana when a solicitation resulting in a loan is received, the IUCCC applies. Def.'s Reply to Subm. at 2.

In taking that position, Defendant misconstrues the Tenth Circuit's holding as it applies to the case at bar. In Quick Payday, a prospective borrower could view the soliciting web page or email, and

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[7] KAN. STAT. ANN. § 16a-1-201(1)(b) states that the KUCCC applies if "the creditor induces the consumer who is a resident of this state to enter into the transaction by solicitation in this state by any means, including but not limited to: Mail, telephone, radio, television or any other electronic means."

within a few electronic clicks enter into a loan agreement with the out-of-state lender, all while remaining at a computer terminal in Kansas. 549 F.3d at 1304. Prospective borrowers did not need to travel to another state to get an offending loan; this is a distinguishing fact from the present case. A close reading of Quick Payday reveals that both the Tenth Circuit and State of Kansas reflected this distinction, conceding that the advertisement alone *did not* trigger application of the Kansas statute. Rather, the controlling factor was the location of the borrower when the loan was actually contracted for. Id. at 1308. The Kansas Office of the State Bank Commission specifically conceded that it would not attempt to apply the Kansas statute to situations where a Kansas consumer left Kansas to acquire a loan. Id.[8]

In the present case, there is no doubt that Midwest Title solicited business in Indiana. However, it is equally clear that no credit agreements were finalized within Indiana.[9] All

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[8] "[The Kansas Office of the State Bank Commission's] brief in this court further clarified . . . that '[t]he [KUCCC] regulates the conduct of Internet payday lenders who choose to make payday loans with Kansas consumers *while they are in Kansas*.' And referring to Quick Payday's hypothetical 'about a Kansas consumer leaving Kansas to acquire a payday loan' it declared that 'the OSBC would not try to apply the [KUCCC] to loans that occur under th[ose] circumstances.' We adopt this reasonable interpretation of the statute by those charged with its enforcement." Quick Payday, 549 F.3d at 1308 (emphasis in original) (internal citations omitted).

[9] Defendant at times seems to confuse a state's legislative reach with a state's judicial jurisdiction. "Contacts" analysis certainly

customers had to physically present themselves at a Midwest Title location in Illinois in order to enter into a binding loan agreement. Just as a Yellow Pages advertisement would not create a loan agreement, it is spurious to argue that a loan has not been transacted until a consumer mails in his payments from his home state. In the present case, no loan agreement came into existence until an Indiana customer traveled to Illinois and obtained a loan at a Midwest Title store. That transaction at that point was completed and it clearly occurred within Illinois where loan documents were signed

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applies when considering the jurisdiction of a state's courts over a party or matter. See International Shoe Co. v. Washington, 326 U.S. 310 (1945). There is no question that Midwest Title, by virtue of its contacts with the forum and activity injected into Indiana, would be subject to the jurisdiction of Indiana courts should a suit against it be filed there. However, the reach of a court's jurisdiction does not determine the territorial bounds of a state legislature's laws (nor does it necessarily even determine the state law to be applied by the court). A state is generally prohibited from asserting legislative power over parties and activities wholly beyond it's borders. See Gerling Global Reinsurance Corp. of Am. v. Gallagher, 267 F.3d 1228, 1236-37 (11th Cir. 2001) (explaining the similarities and distinctions between judicial and legislative jurisdiction, and holding that life insurance policies issued outside the state by out-of-state entities were not subject to Florida legislative regulation). Applying the Seventh Circuit's analysis in Dean Foods, the contacts in this case are insufficient to give Indiana legislative jurisdiction over the loan contracts in question.

and Midwest Title had tendered a loan payment in exchange for a promise to repay.[10]

Pursuant to established Seventh Circuit precedent and consistent with conclusions reached by other circuits, we hold that the loan transactions at issue in this case occurred wholly within the state of Illinois.

B. Invalidity of Extraterritorial Statutes:

The IDFT correctly argues that, even where a law is held to burden interstate commerce, the Seventh Circuit applies the two-tiered analysis of Pike. See Pike, 397 U.S. at 142; Def.'s Br. in Supp. at 15 (citing Alliant Energy Corp v. Bie, 336 F.3d 545, 546 (7th Cir. 2003)). Pursuant to that test, a statute which facially or directly discriminates against or regulates interstate commerce is subject to strict scrutiny. Alliant Energy, 336 F.3d at 546. If a statute's effects on interstate commerce are only incidental, or are direct but applied evenhandedly, the Pike balancing test balances the burden on interstate commerce against the state's legitimate policy concerns. Id.

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[10] Other cases Defendant cites are similarly distinguishable. In each of the Aldens cases, an Illinois mail-order company was required to comply with the consumer credit laws of other states when its customers ordered merchandise on credit through the Aldens catalog. See Aldens, Inc. v. Ryan, 571 F.2d 1159 (10th Cir. 1978); Aldens, Inc. v. LaFollette, 552 F.2d 745 (7th Cir. 1977); Aldens, Inc. v. Packel, 524 F.2d 38 (3d Cir. 1975). However, in each of these cases, the customer was located in his or her home state when he or she ordered merchandise and entered into the purchase contract. Under the Dean Foods analysis, such transactions could not be held to have occurred wholly outside the customer's state.

Alliant Energy rejected the premise that "precedent mandates the *per se* invalidation of every state regulation that has any extraterritorial effect whatsoever." Id. at 546.[11] In fact, several cases have specifically noted that, while economic protectionism is *per se* invalid, other motivations may trigger a balancing of interests. See CTS Corp., 481 U.S. at 93 (rejecting the contention that Indiana has no interest in protecting its citizens from unfair business dealings); Alliant Energy, 336 F.3d at 549 (acknowledging that a state has an interest in protecting the welfare of its citizens); Morley-Murphy v. Zenith, 142 F.3d 373, 379 (7th Cir. 1998) ("[State courts] are well aware that the Supreme Court has held that certain assertions of extraterritorial jurisdiction violated the dormant Commerce Clause.") (emphasis added). However, although the Supreme Court has held that certain extraterritorial *effects* of statutes are permissible, e.g., CTS, 481 U.S. at 93 (holding that a statute that regulated internal matters but had external effects was constitutionally valid), statutory provisions that

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[11] Initially, this statement appears to be in conflict with Supreme Court precedent. In Edgar v. MITE, 457 U.S. 624 (1982), Justice White, writing for the Court, suggested that all extraterritorial regulation should be *per se* invalid. The Seventh Circuit noted that "a majority of justices agreed that the two tiered [Pike] test was the appropriate approach; however, they didn't agree on how the case before them fit that test. Read in this light, the opinion suggests that extraterritorial regulations are subject to the traditional interstate commerce analysis." Alliant Energy, 336 F.3d at 548; see also CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 81 (1987) (noting that "as the plurality in MITE did not represent the views of a majority of the Court, we are not bound by its reasoning").

specifically seek to regulate extraterritorial conduct are a different matter. See Alliant Energy, 336 F.3d at 548-49 (indicating that a statute directly regulating extraterritorial activity is unquestionably invalid, but applying Pike balancing to statutes with indirect effects on extraterritorial commerce).

The present case does not involve a statute which merely burdens interstate commerce or has extraterritorial *effects*. It concerns a statutory provision which, by design, directly regulates extraterritorial activity. Even according to Defendant's primary authority, Alliant Energy, such a statute is *per se* invalid. 336 F.3d at 548-49 (holding that "direct extraterritorial interference" or regulation is "unquestionably *per se* invalid," but reserving that a statute may be balanced against state interests where the statute "regulates internal matters and the regulations have external effects" or where the statute has "indirect effects on extraterritorial commerce"); see also Healy, 491 U.S. at 336 ("[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid . . . ."); Nat'l Solid Waste Mgmt. Ass'n, 63 F.3d at 658-60 (indicating that a statute is invalid where it has the "practical effect" of controlling commerce wholly outside the state). Cf. Ill. Rest Ass'n v. City of Chicago, 492 F. Supp. 2d 981 (holding that despite a city ordinance's extraterritorial effects, it was valid because it was aimed at a sufficiently local problem).

A state may not directly regulate conduct or events beyond its own borders, no matter its

motivation for doing so. See Bigelow v. Virginia, 421 U.S. 809, 824-25 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.") Here, the territorial application provision, as interpreted by the Defendant, purports to apply the IUCCC to consumer loan transaction occurring wholly within the state of Illinois. Despite Defendant's attempt to paint the loan transactions as occurring partially in Indiana based on the reach of the solicitations issued to potential customers in this state, it is clear that the statute does not regulate the conduct of Midwest Title within the state of Indiana; it seeks to regulate Midwest Title's lending activities in Illinois.[12]

Were we to adopt the Defendant's view we would be giving the proverbial *carte blanche* to states to impose their diverse regulatory schemes on any commercial activity which affects any other state's

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[12] The Supreme Court also noted in CTS Corp. that statutes are routinely held invalid if they "adversely affect interstate commerce by subjecting activities to inconsistent regulations." 481 U.S. at 88; see also Healy, 491 U.S. at 336-37 (indicating that the Commerce Clause is designed to protect against "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state"). This problem is readily apparent in the present action. Do the Plaintiff's title loans need to adhere to Indiana law, or Illinois law? The Defendant argues that a loan made to an Indiana consumer must follow Indiana law, even if the loan is transacted in Illinois. However, Illinois law indicates that a title lender in Illinois need only comply with the Illinois Consumer Installment Loan Act. 205 ILL. COMP. STAT. 670/9; ILL. ADMIN. CODE tit. 38 §§ 110.320 to .430.

interests and satisfies a rudimentary minimum contacts test. Just as "citizens do not carry their home state's laws with them wherever they go," Warriner v. Stanton, 475 F.3d 497, 504 (3d Cir. 2007), state laws surely should not be permitted to travel wherever someone would have them go.

III. Permanent Injunction

When a permanent injunction is requested at summary judgment, a court must consider whether (1) the plaintiff has succeeded on the merits; (2) remedies at law, such as monetary damages, are inadequate to compensate for that harm; (3) an injunction is warranted after balancing the hardship to plaintiff against potential hardship to the defendant in granting the injunction; and (4) the public interest does not argue against granting the injunction. Collins v. Hamilton, 349 F.3d 371 (7th Cir. 2003). A violation of constitutional rights under the Commerce Clause constitutes an irreparable injury for the purposes of considering an injunction. Kendall-Jackson Winery v. Branson, 82 F. Supp. 2d 844, 878 (N.D. Ill. 2000); Gov't Suppliers Consolidating Serv., Inc. v. Bayh, 734 F. Supp. 853, 864 (S.D. Ind. 1990). In addition, Midwest Title's losses are not recoverable against the State because the 11th Amendment's doctrine of sovereign immunity bars suits for money damages against a state in federal court. Wynn v. Southward, 251 F.3d 588, 592 (7th Cir. 2001).

Balancing harm to the parties and considering the public interest "largely overlap" when a Plaintiff sues a government entity to enjoin enforcement of a

statute. Prof'l Towing & Recovery Operators fo Ill. v. Box, 2008 U.S. Dist. LEXIS 100002, 45 (N.D. Ill. 2008). While the public has an interest in enforcing laws that promote safety or welfare, the public has no cognizable interest in enforcing laws that are unconstitutional. See id. at 45-46. Indeed, the public interest is best served by preventing unconstitutional enforcement. Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 261 (4th Cir. 2003) ("Surely, upholding constitutional rights serves the public interest."); Preston v. Thompson, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest.").

This court is not unsympathetic to Indiana's policy interests against the predatory lending practices seemingly prevalent in the consumer loan industry. The loan terms offered by Midwest Title appear to us to at least approach being abusive and unconscionable. However, it is the domain of Illinois to regulate its own consumer lending industry, as Indiana has the power and responsibility to regulate its own consumer lending industry. As far back as 1935, in Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), when New York attempted to project price regulation upon milk producers in Vermont to ensure an adequate supply of milk for New York citizens, despite the worthy social policy behind the regulation, the Supreme Court ruled: "One state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories . . . the legislature of Vermont and not that

of New York must supply the fitting remedy." Id. at 524. So it is, seventy-five years later, between Indiana's and Illinois's respective economic interests: each is limited to managing and regulating its own activities.

IV. Conclusion:

For the foregoing reasons, IND. CODE § 24-4.5-1-201(d) is hereby ruled unconstitutional as applied to Midwest Title to regulate title loans made wholly in the state of Illinois; and Midwest Title is entitled to a permanent injunction against IDFT's application of the IUCCC to loans made wholly in the state of Illinois to Indiana residents. Accordingly, Plaintiff's Motion for Summary Judgment is GRANTED, and Defendant's Motion for Summary Judgment is DENIED. Final judgment shall be entered accordingly.

IT IS SO ORDERED.

Date: 04/03/2009

SARAH EVANS BARKER,
JUDGE
United States District Court
Southern District of Indiana

Copies to:
Gary W. Bippus
INDIANA STATE ATTORNEY GENERAL
gary.bippus@atg.in.gov

Stanley C. Fickle
BARNES & THORNBURG LLP
sfickle@btlaw.com

Paul L. Jefferson
BARNES & THORNBURG LLP
pjefferson@btlaw.com

John R. Maley
BARNES & THORNBURG
jmaley@btlaw.com

Alan S. Kaplinsky and Jeremy T. Rosenblum
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor, Philadelphia, PA
19103-7599

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MIDWEST TITLE LOANS, INC.,	)	
Plaintiff,	)	
vs.	)	1:07-cv-1479-SEB-DML
JUDITH J. RIPLEY, In Her Official Capacity as Director of the Indiana Department of Financial Institutions,	)	
Defendant.	)	

JUDGMENT

The Court, having contemporaneously granted Plaintiff's Motion for Summary Judgment and Permanent Injunction and denied Defendant's Motion for Summary Judgment, now, pursuant to Rule 58(a), enters judgment in favor of Plaintiff and against Defendant.

IT IS SO ORDERED.

Date: 3/24/2009

SARAH EVANS BARKER,
JUDGE
United States District Court
Southern District of Indiana

Copies to:
Gary W. Bippus
INDIANA OFFICE OF THE ATTORNEY GENERAL
gary.bippus@atg.in.gov

Chadwick C. Duran
INDIANA OFFICE OF THE ATTORNEY GENERAL
cduran@atg.state.in.us

Stanley C. Fickle
BARNES & THORNBURG LLP
sfickle@btlaw.com

Paul L. Jefferson
BARNES & THORNBURG LLP
pjefferson@btlaw.com

Alan S. Kaplinsky
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
kaplinsky@ballardspahr.com

John R. Maley
BARNES & THORNBURG
jmaley@btlaw.com

Jeremy T. Rosenblum
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
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MIDWEST TITLE LOANS, INC.,	:	
Plaintiff,	:	
vs.	:	1:07-cv-1479-SEB-DML
JUDITH J. RIPLEY, In Her Official Capacity as Director of the Indiana Department of Financial Institutions,	:	
Defendant.	:	

JOINT STIPULATION OF FACTS

Plaintiff Midwest Title Loans, Inc. and defendant Judith Ripley, in her official capacity as the Director of the Indiana Department of Financial Institutions, submit this Joint Stipulation of Facts, and stipulate as follows:

1. Plaintiff Midwest Title Loans, Inc. ("Midwest Title") is an Illinois business corporation, licensed by the Illinois Department of Financial Institutions as a consumer installment loan company. Midwest Title makes loans (the "Loans") from 23 stores located in Illinois.

2. Midwest Title maintains no stores in Indiana. Midwest Title only makes Loans in-person and only makes loans to borrowers who visit its Illinois stores.

3. Judith Ripley (the "Director") serves as the chief executive and administrative officer of the Indiana Department of Financial Institutions (the "Department") and is responsible for the administration of the policies established for the Department by or pursuant to applicable Indiana legislation. The Director exercises managerial control over the work of the Department, including the Supervisor of the Division of Consumer Credit (the "Supervisor") as well as other division supervisors, deputy directors, examiners and administrative personnel.

4. Midwest Title provides Loans which are secured by the borrower's motor vehicle. Midwest Title will lend up to approximately 50% of the estimated wholesale value of the vehicle which secures the Loan. Contract terms provide that the Loans are payable in equal monthly installments over a period of 12, 18 or 24 months. Annual percentage rates of interest on the Loan are typically approximately 300% (but may be more or less) compared with the 36% per annum rate limitation under the Indiana Uniform Consumer Credit Code ("UCCC"). The Loan documents expressly call for the application of the law of the state in which the contract is executed.

5. In mid-August 2007, Midwest Title received a letter from the Supervisor (the "Letter"), a true,

accurate and admissible copy of which is attached hereto as Exhibit 1.

6. Midwest Title made Loans to Indiana residents from 1999 through mid-August 2007, when it received the Letter. During 2006, Midwest Title made 2,054 Loans to Indiana residents. For the period in 2007 prior to receipt of the Letter, Midwest Title made 907 Loans to Indiana residents.

7. Midwest Title maintains no stores or employees in Indiana and only makes Loans in-person to applicants (including applicants residing in Illinois and other states including, until receipt of the Letter, Indiana) who visit one of its Illinois stores and bring both their motor vehicle and their motor vehicle title to the Illinois store. Midwest Title contracted with unaffiliated third parties in Indiana to effect repossession, storage of vehicles and auctioning or other sales to dispose of repossessed vehicles. It also contracted with advertisers, including television stations based in Indiana, to advertise its financial products to Indiana residents.

8. Before Midwest Title's receipt of the Letter, Midwest Title's contacts with the State of Indiana were the following:

(a) Midwest Title made Loans, at its Illinois stores, to Indiana residents who applied for Loans at its Illinois stores. To obtain a Loan, an Indiana resident needed to bring his or her motor vehicle and the motor vehicle title to one of Midwest Title's Illinois stores and apply in person for the Loan. If

approved for a Loan, the applicant needed to execute the necessary Loan documents at the Illinois store and provide Midwest Title with a set of keys to the vehicle securing the loan to assist the unaffiliated repossession companies with which Midwest contracted in effecting self-help repossession of the vehicle in the event of a default that does not get cured by the borrower after receiving written notice of default from Midwest Title. The Loan funds were disbursed at the Illinois store in the form a check, drawn on an Illinois bank that could be cashed without charge at the store (or could be cashed elsewhere). Midwest Title did not make Loans to borrowers who were not physically present at one of Midwest Title's Illinois stores. A true and correct copy of the blank form of Loan application currently used by Midwest Title is attached hereto as Exhibit 2. A true and correct copy of the blank form of the Installment Loan and Security Agreement used by Midwest Title (the "Note") is attached hereto as Exhibit 3. The Note expressly provides that the Note will be governed by the laws of the state in which it is executed.

(b) Midwest Title made annual mailings to past customers, including Indiana residents, thanking them for their business and reminding them of the availability of Loans from Midwest Title. These mailings were addressed to individual Indiana residents. One of the purposes of these mailings was to solicit repeat business from previous borrowers.

(c) Midwest Title advertised on television stations in Indianapolis and Terre Haute, Indiana.

It also advertised on television and radio stations in Chicago which reach Indiana residents.

(d) Store employees in Illinois may have caused Midwest Title to have its name and Illinois phone number and/or an 800 number included in Yellow Pages listings in Indiana.

(e) Midwest Title made available an 800 number staffed by personnel physically located outside Indiana. By calling the 800 number, prospective borrowers, including Indiana residents, could obtain information about the Loans and how to apply for a Loan. However, prospective borrowers could not apply for or obtain Loans over the telephone, through the mail, by fax, over the Internet, or by any means other than that described in subparagraph 8(a) above.

(f) After making a Loan to an Indiana resident, Midwest Title would generally submit to the Indiana Bureau of Motor Vehicles (the "BMV") the documents necessary to have Midwest Title's lien noted on the borrower's motor vehicle title and would then hold physical possession of the certificate of tile upon receipt from the BMV.

(g) Borrowers could make principal and interest payments in person at Midwest Title's Illinois stores or pay from any location, including Indiana, by money order or certified check transmitted through the U.S. mail or other means, by credit card or through Western Union. No payments are accepted by Midwest Title in Indiana.

(h) From its Illinois offices, Midwest Title made reminder and collection calls to Indiana borrowers. In the event of a default of at least thirty days, Midwest Title paid an unaffiliated third party repossession company to effect repossession of the vehicle securing the Loan from wherever the vehicle may be located, including within Indiana, and obtained a new title from the BMV showing Midwest Title as the owner of the vehicle. Repossessed Indiana motor vehicles are kept in Indiana prior to sale and are sold through an unaffiliated Indiana auction house. Midwest Title has not brought any lawsuits to collect deficiency judgments, and has not filed any actions in federal or state courts in Indiana, excepting the instant lawsuit.

9. Other than taking title to the motor vehicles in connection with the repossession, storage or sale of collateral securing the Loans, Midwest Title does not own or lease property in Indiana. Midwest Title does not hold a certificate of authority or license to do business in Indiana. Midwest Title has not had and does not have agents or employees who solicit business in person in Indiana. Midwest Title's loan agreements are negotiated and executed in Illinois but other contractual relationships, including contracts for advertising and agreements with repossession and/or auction companies, are made with parties who may be located in Indiana. Midwest Title never enters into such contracts in Indiana. Midwest Title executes in Illinois for applications for certificates of title for vehicles it has repossessed and then causes to be auctioned in Indiana as the owner of the vehicle.

10. The Letter sent by the Supervisor to Midwest Title stated that, as amended effective July 1, 2007, Ind. Code § 24-4.5-1-201 "requires lenders who are soliciting by any means and then making consumer loans to Indiana residents to be licensed" under the Indiana UCCC. The Letter quoted Ind. Code § 24-4.5-1-201(8) as follows: "If a creditor has violated the provisions of this article that apply to the authority to make consumer loans (IC 24-4.5-3-502), the loan is void and the debtor is not obligated to pay either the principal or loan finance charge, as set forth in IC 24-4.5-5.202." The Letter further stated that: "Failure to comply with Indiana law concerning loans made to Indiana residents could subject your company to regulatory enforcement by the office of the Indiana Attorney General and raise possible civil claims by customers."

11. While the Letter does not explicitly say so, it is the position of the Director that the Indiana UCCC does not apply to a loan consummated in a face-to-face meeting outside Indiana unless the loan resulted from either a solicitation received by the borrower in Indiana or media advertising originating in Indiana. In the instant case, it is the position of the Director that the Indiana UCCC only applies to Loans resulting from a solicitation received by the borrower in Indiana by any means, including direct solicitation letters from outside the State, Yellow Pages listings in Indiana and advertisements on Indiana (but not Illinois) television stations.

12. Midwest Title suspended offering Loans to Indiana residents immediately after receiving the Letter.

13. Midwest Title discontinued charging or collecting any interest on Loans to Indiana borrowers made between July 1, 2007 and Midwest Title's receipt of the Letter (the "Covered Loans") and refunded all previous payments of interest on the Covered Loans. True, correct and admissible copies of correspondence on this issue between Midwest Title and the Department are attached hereto as Exhibit 4.

14. In response to the 2007 amendment to Ind. Code § 24-4.5-1-201 and the Department's notice of enforcement of the Indiana UCCC against Midwest Title, Midwest Title suspended offering Loans to any Indiana residents and waived all finance charges on the Covered Loans.

15. Midwest Title has lost revenue as a result of this suspension of business with Indiana borrowers.

16. Midwest Title continues to accept payments of principal and interest on Loans to Indiana borrowers made prior to July 1, 2007 and continues to accept principal payments on Covered Loans.

17. This is a partial Stipulation in that the parties anticipate the submission of at least a limited amount of additional designated evidence when cross-motions for summary judgment are filed. This agreement shall not constitute an admission by either party that any stipulated fact set forth herein, or otherwise submitted, is relevant or otherwise admissible.

Stanley C. Fickle
John R. Maley
Paul L. Jefferson
Barnes & Thornburg LLP
11 South Meridian Street
Indianapolis, IN 46204
Telephone: (317) 236-1313
Facsimile: (317) 231-7433
E-mail: stan.fickle@btlaw.com
jmaley@btlaw.com
pjefferson@btlaw.com
Counsel for Plaintiff
Midwest Title Loans, Inc.

Chadwick C. Duran
Gary L. Bippus
Deputy Attorney General
5th Floor, Indiana Government Center South
402 West Washington Street
Indianapolis, IN 46204

Counsel for Defendant
Judith J. Ripley, In Her Official Capacity as Director of the Indiana Department of Financial Institutions

No. 09-1325

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In The
Supreme Court of the United States

DAVID H. MILLS, DIRECTOR OF THE INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS,

Petitioner,

v.

MIDWEST TITLE LOANS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

BURT M. RUBLIN
Counsel of Record
ALAN S. KAPLINSKY
JEREMY T. ROSENBLUM
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
215.665.8500
rublin@ballardspahr.com

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Court of Appeals correctly held that the dormant Commerce Clause prohibits Indiana's extraterritorial enforcement of a unique "Territorial Application Provision" that sought to extend the reach of Indiana's version of the Uniform Consumer Credit Code to loan transactions that the parties stipulated were entered into in-person "wholly outside of the State's borders." *Healy v. The Beer Institute*, 491 U.S. 324, 336 (1989).

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that respondent Midwest Title Loans, Inc. has no parent corporation or publicly-held company owning 10% or more of its stock.

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INTRODUCTION

In this case, the District Court (Judge Sarah Evans Barker) and a unanimous Seventh Circuit Court of Appeals panel (per Judge Richard Posner) rendered comprehensive, carefully reasoned opinions that correctly concluded that the dormant Commerce Clause prohibits Indiana's unique effort to engage in extraterritorial regulation of loan transactions entered into in-person in Illinois. *Midwest Title Loans v. Ripley*, 616 F.Supp.2d 897 (S.D. Ind. 2009), *aff'd sub nom. Midwest Title Loans v. Mills*, 593 F.3d 660 (7th Cir. 2010). In enjoining the enforcement of Indiana's "Territorial Application Provision," which impermissibly sought to extend the reach of Indiana's Uniform Consumer Credit Code to loan transactions that the parties stipulated took place entirely in Illinois, the lower courts relied upon and were entirely faithful to this Court's well-settled Commerce Clause jurisprudence, which establish that the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. The Beer Institute*, 491 U.S. 324, 336 (1989); *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion).

Each of the lower courts expressly acknowledged the concern of Indiana and its amici about protecting the economic well-being of Indiana consumers, but properly recognized that "however well intentioned" the Territorial Application Provision may be, it cannot pass muster under the Commerce Clause because it

directly regulates commerce occurring wholly outside the State's boundaries. Pet. App. 12a. *See Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.").

Neither the Petitioner nor his amici has identified any conflict whatsoever between the Seventh Circuit's decision and the decisions of any other court of appeals or state supreme court. As correctly recognized by both the District Court and the Seventh Circuit, this case is readily distinguishable from the various cases cited by Petitioner and his amici, as none of those cases involved transactions entered into in-person wholly outside the boundaries of the regulating state. In fact, Petitioner and his amici have not identified *any* case in which an appellate court has upheld extraterritorial regulation of a loan or purchase entered into in-person outside the regulating state. Not only was Judge Posner's cogent opinion amply supported by this Court's well-settled precedents under the dormant Commerce Clause, it also relied upon a number of cases from other circuits which have likewise held that if a state statute directly regulates interstate commerce in other states, it violates the Commerce Clause *per se*. Pet. App. 10a-11a.

The opinion below did not plow any new ground and does not conflict with applicable precedents from this Court or any other circuit. Moreover, the

Territorial Application Provision at issue here is not part of the model Uniform Consumer Credit Code. Thus, the Seventh Circuit's decision will not have broad ramifications beyond the confines of this case. Also, contrary to the arguments by Petitioner and his amici, this Court has already provided ample and clear guidance to lower courts and state legislatures concerning the permissible reach of state legislation under the Commerce Clause. Finally, the myriad arguments by Petitioner and his amici concerning "predatory" lending, Internet lending, and the "tension" between Commerce Clause and Due Process jurisprudence supposedly created by *dicta* in the decision below utterly fail to demonstrate that certiorari is warranted here.

STATEMENT

In 2007, Indiana amended its version of the Uniform Consumer Credit Code. It added a "Territorial Application Provision," which states as follows:

> (d) [A] sale, lease, or loan transaction occurs in Indiana if a consumer who is a resident of Indiana enters into a consumer sale, lease, or loan transaction with a creditor . . . in another state and the creditor . . . has advertised or solicited sales, leases, or loans in Indiana by any means, including by mail, brochure, telephone, print, radio, television, the Internet, or electronic means. . . .

Ind. Code § 24-4.5-1-201(1)(d). Thus, both on its face and as applied by the Indiana Department of Financial Institutions to Midwest Title, the Territorial Application Provision purports to regulate loans made in-person outside of Indiana's borders to Indiana residents so long as the lender has done any advertising or other solicitation in Indiana.

If the Territorial Application Provision is triggered, the lender becomes subject to the Indiana Uniform Consumer Credit Code. It then is required to obtain a license from the State to make consumer loans and is bound by a variety of restrictions that include a ceiling on the annual interest rate that a lender may charge. The ceiling is the lower of 21% of the entire unpaid balance, or 36% on the first $300 of unpaid principal, 21% on the next $700, and 15% on the remainder. Ind. Code § 24-4.5-3-508. A lender required to have a license who fails to obtain it or violates any of the statutory restrictions is exposed to a variety of administrative and civil remedies. Ind. Code §§ 24-4.5-6-108, 24-4.5-6-110, 24-4.5-6-113. The failure to obtain a license also voids the loan – the borrower doesn't have to repay even the principal. And a borrower who has paid finance charges in excess of those permitted by the Code is entitled to a refund. Ind. Code § 24-4.5-5-202. Pet. App. 2a-3a.

The relevant facts were stipulated by the parties in connection with their respective motions for summary judgment. Pet. App. 48a-56a. Midwest Title is an Illinois business corporation and licensed by the Illinois Department of Financial Institutions as a

consumer installment loan company. Pet. App. 48a. It is an auto title lender, making cash loans to very high risk borrowers which are secured by the borrower's automobile. Pet. App. 3a. The interest rate on these loans is allowed under Illinois law, but exceeds the 36% per annum rate limitation under the Indiana Uniform Consumer Credit Code. Pet. App. 49a. Midwest Title makes loans only from 23 stores located in Illinois. Pet. App. 48a. Most importantly, it only makes loans in-person to borrowers who travel to its Illinois stores. Pet. App. 49a.

Midwest Title maintains no stores, employees or agents in Indiana. Pet. App. 49a, 50a. Midwest Title does not own or lease property in Indiana, and does not hold a certificate of authority or license to do business in Indiana.[1] Pet. App. 53a. It does not have agents or employees who solicit business in-person in Indiana. Pet. App. 53a. Other than this lawsuit, it has not filed any suits in Indiana, and has not filed any suits against Indiana borrowers to collect deficiency judgments. Pet. App. 53a.

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[1] Because Midwest Title made its loans to Indiana residents only in-person at its Illinois stores, it was not required to have a certificate of authority to do business in Indiana. *See* Ind. Code § 23-1-49-1(b)(6) and (b)(11) (a company is *not* considered to be transacting business in Indiana if it is "[s]oliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside of Indiana before they become contracts" or if it is "[t]ransacting business in interstate commerce").

To obtain a loan from Midwest Title, an Indiana resident had to travel to Illinois with his or her motor vehicle and the title to the vehicle, and appear in-person at a Midwest Title store in Illinois. Pet. App. 50a-51a. Midwest Title did not make any loans to Indiana residents who were not physically present at an Illinois store. Pet. App. 51a. If approved, the loan applicant had to execute the necessary loan documents at the Illinois store and provide Midwest Title with a set of keys and the title to the automobile in order to secure repayment. Pet. App. 51a. The loan funds would then be disbursed at the Illinois store by check drawn on an Illinois bank which could be cashed without charge at the Illinois store (or could be cashed elsewhere). Pet. App. 51a. The Installment Loan and Security Agreement provided that the transaction would be governed by the law of the state in which the Agreement was executed, which was Illinois. Pet. App. 51a.

After making a loan to an Indiana resident, Midwest Title generally submitted to the Indiana Bureau of Motor Vehicles the documentation necessary for Midwest Title's lien to be noted on the borrower's motor vehicle title. Pet. App. 52a. Borrowers could make re-payments in person at Midwest Title's Illinois stores or pay by money order or certified check transmitted through the U.S. mail or other means, by credit card or through Western Union. Pet. App. 52a. No payments are accepted by Midwest Title in Indiana. Pet. App. 52a.

Midwest Title advertised on radio and television stations in Indianapolis and Terre Haute, Indiana. Pet. App. 51a. It also advertised on radio and television stations in Chicago which reached Indiana residents. Pet. App. 52a. Midwest Title made annual mailings to past customers, including Indiana residents, reminding them of the availability of loans from Midwest Title. Pet. App. 51a. Midwest Title was also listed in the Yellow Pages directory in some Indiana communities. Pet. App. 52a.

Midwest Title made in-person loans in Illinois to Indiana residents from 1999 until August 2007. Pet. App. 50a. In August 2007, Midwest Title received a warning letter from the Indiana Department of Financial Institutions apprising it of the recently-enacted Territorial Application Provision. Pet. App. 49a, 54a. The letter warned Midwest Title that the Territorial Application Provision "requires lenders who are soliciting by any means and then making consumer loans to Indiana residents to be licensed" under the Indiana Uniform Consumer Credit Code. Pet. App. 54a. It admonished that "[f]ailure to comply with Indiana law concerning loans made to Indiana residents could subject your company to regulatory enforcement by the office of the Indiana Attorney General and raise possible civil claims by customers." Pet. App. 54a.

Upon receipt of the warning letter, Midwest Title immediately suspended offering loans to Indiana residents. Pet. App. 54a. It also stopped charging and collecting interest on loans made to Indiana

borrowers between July 1, 2007 and receipt of the letter, and refunded all previous payments of interest on those loans. Pet. App. 55a.

1. The District Court Decision

Midwest Title filed suit under 42 U.S.C. § 1983 against the Indiana Department of Financial Institutions seeking to enjoin enforcement of the Territorial Application Provision. Pet. App. 22a. Based on the facts stipulated by the parties, the District Court issued a thoughtful, carefully reasoned ruling that the Territorial Application Provision was unconstitutional under the dormant Commerce Clause. Pet. App. 21a-43a. The District Court concluded that "no credit agreements were finalized within Indiana;" instead, "the loan transactions at issue in this case occurred wholly within the state of Illinois." Pet. App. 35a, 37a. The Court emphasized that "no loan agreement came into existence until an Indiana customer traveled to Illinois and obtained a loan at a Midwest Title store. That transaction at that point was completed and it clearly occurred within Illinois where loan documents were signed and Midwest Title had tendered a loan payment in exchange for a promise to repay." Pet. App. 36a-37a.

The Court concluded that "[t]he present case does not involve a statute which merely burdens interstate commerce or has extraterritorial *effects*. It concerns a statutory provision which, by design, directly regulates extraterritorial activity. Even according to

Defendant's primary authority . . . such a statute is *per se* invalid." Pet. App. 39a. (italics in original). The Court correctly recognized that extraterritorial regulation of interstate commerce is not allowed: "[j]ust as 'citizens do not carry their home state's laws with them wherever they go' . . . state laws surely should not be permitted to travel wherever someone would have them go." Pet. App. 41a. The Court stressed that it "is not unsympathetic to Indiana's policy interests against the predatory lending practices seemingly prevalent in the consumer loan industry . . . However, it is the domain of Illinois to regulate its own consumer lending industry, as Indiana has the power and responsibility to regulate its own consumer lending industry." Pet. App. 42a. Indeed, "[a] state may not directly regulate conduct or events beyond its own borders, no matter its motivation for doing so." Pet. App. 39a-40a.

2. The Seventh Circuit Decision

The Seventh Circuit unanimously affirmed the District Court's decision. Pet. App. 1a-20a. Writing for the Court, Judge Posner carefully addressed all of the myriad legal and public policy arguments offered by both the State and its amici in a carefully-crafted, scholarly opinion. The Court of Appeals correctly recognized that the Midwest Title loans were "made and executed in Illinois," as "[t]he loans were made only in person, at Midwest's offices in Illinois." Pet. App. 4a, 18a. Indeed, every single aspect of the loan transaction occurred in Illinois:

> Each title loan that Midwest made to a Hoosier was in the form of a check, drawn on an Illinois bank, that was handed to the borrower at Midwest's loan office and could be cashed there. Illinois was also where the conditional transfer of title to the collateral was made (the handing over of the keys – the 'pawn'), and where the payments required by the loan agreement were received by Midwest. Pet. App. 17a-18a.

Judge Posner's opinion properly held that under this Court's longstanding Commerce Clause jurisprudence, "where states actually attempt to regulate activities in other states," there is a *per se* violation of the Commerce Clause. Pet. App. 10a. Such extraterritorial regulation will be "invalidated without a balancing of local benefit against out-of-state burden." Pet. App. 10a. Significantly, the opinion did not reject or refuse to follow the holding of any other appellate court opinion. Quite to the contrary, the Seventh Circuit cited with approval a number of decisions by other Circuits that have similarly held that the dormant Commerce Clause renders invalid *per se* a state's extraterritorial enforcement of its laws.[2] Pet. App. 10a-11a.

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[2] The Court relied upon the following decisions from other circuits: *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 62-64 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009); *Carolina Trucks & Equip. v. Volvo Trucks, N. Amer.*, 492 F.3d 484, 488-90 (4th Cir. 2007); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 239-41 (4th Cir. 2004); *American Booksellers Foundation v. Dean*, 342 F.3d 96,

(Continued on following page)

Like the District Court, the Seventh Circuit specifically addressed the public policy arguments raised by the State and its amici concerning "predatory" lending in general, and auto title lending in particular. Pet. App. 5a-8a. The Court of Appeals properly held that "the projection of one state regulatory regime into the jurisdiction of another State" runs afoul of the Commerce Clause, "however well intentioned and genuinely beneficial to the state imposing it." Pet. App. 12a, 14a. In characteristic fashion, Judge Posner illustrated this principle with various hypothetical examples of possible state extraterritorial legislation that might be enacted for the salutary purpose of protecting a state's own citizens from harm in other states (*e.g.*, addictive gambling in out-of-state casinos; the purchase of dangerous firecrackers in adjacent states; or the consumption of trans fats in restaurants in other states) but would nonetheless violate the Commerce Clause "by restricting travel and a firm's ability to deal with residents of a different state." Pet. App. 12a, 18a-19a. Each of those examples demonstrates that "[c]ommerce would be impeded if states could regulate commercial activities in other states." Pet. App. 11a. In other words, "[t]o allow Indiana to apply its law against title loans when its residents transact in a different state that has a different law would be

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102-04 (2d Cir. 2003); *National Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 638-40 (9th Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994).

arbitrarily to exalt the public policy of one state over that of another." Pet. App. 15a.

The State did not seek rehearing of the panel's unanimous decision.

REASONS FOR DENYING THE PETITION

The assiduous efforts of Petitioner and his amici to create the appearance that the decision below has created a circuit conflict are unavailing. Neither the rather prolix Petition for Certiorari nor the two amici briefs identify *any* appellate decision which has allowed a state to regulate a loan or purchase that was entered into in-person wholly outside its own borders. The Seventh Circuit did not reject or criticize any applicable precedent from other appellate courts, but instead acted in accordance with decisions by this Court and courts of appeals from other circuits that have consistently and uniformly held that direct extraterritorial state regulation of interstate commerce is a *per se* violation of the Commerce Clause.

I. The Seventh Circuit Decision Comports Fully With This Court's Well-Settled Commerce Clause Jurisprudence

Contrary to the assertions by Petitioner and his amici, there is no conflict in the circuits or doctrinal confusion warranting a grant of certiorari in this case. Indeed, neither the Petition nor the amici briefs cite *any* appellate decision suggesting that there is

either a circuit split or uncertainty in the lower courts concerning the extent to which a state may engage in extraterritorial regulation of interstate commerce. The reason for the absence of a circuit split or confusion in the lower courts is that this Court has already provided clear guidance with respect to the limits imposed by the dormant Commerce Clause on state efforts to directly regulate interstate commerce that occurs wholly outside the state's borders.

This Court long has recognized that the affirmative grant of authority to Congress to regulate interstate commerce "also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Institute*, 491 U.S. 324, 326 n.1 (1991). *See also Dennis v. Higgins*, 498 U.S. 439, 447 (1991) ("[T]he Commerce Clause does more than confer power on the Federal Government; it is also a substantive 'restriction on permissible state regulation' of interstate commerce.").

One of the ways in which a state law will be held invalid *per se* under the Commerce Clause is if it directly regulates commerce occurring entirely outside of the state's borders. The extraterritoriality principle is well established in this Court's jurisprudence, dating back over a century to *Bonaparte v. Tax Court*, in which this Court held that "[n]o State can legislate except with reference to its own jurisdiction." 104 U.S. 592, 594 (1881). Thereafter, in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), this Court held that a state regulation purporting to

set prices for transactions occurring in another state was barred by the Commerce Clause. Justice Cardozo's opinion for the Court stated that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." *Id.* at 521.[3]

A half-century later, in *Healy v. The Beer Institute*, 491 U.S. 324 (1989), this Court held that a state may not enact laws that establish prices for transactions that occur in other states. The State of Connecticut prohibited in-state beer sales at prices exceeding the distributor's out-of-state prices. Although the trigger of the regulation was the sale of beer *within* the State, this Court held the regulation unconstitutional under the dormant Commerce Clause because the pricing mechanism also regulated prices in out-of-state transactions.

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[3] *See also New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority, and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question, and hence authorities directly dealing with it do not abound"); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extraterritorial effect only by the comity of other States").

The Court emphasized that its various decisions holding that extraterritorial state laws violate the dormant Commerce Clause "reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Id.* at 335-36.

The Court in *Healy* clearly delineated the following governing principles concerning state regulation of interstate commerce:

> First, the 'Commerce Clause . . . *precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State,' Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982) (plurality opinion); *see also Brown-Forman*, 476 U.S., at 581-583; and, specifically, a State may not adopt legislation that has the practical effect of establishing 'a scale of prices for use in other states,' *Seelig*, 294 U.S., at 528. Second, *a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid* regardless of whether the statute's extraterritorial reach was intended by the legislature. *The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Brown-Forman*, 476 U.S., at 579. . . . Generally speaking, the Commerce Clause protects against

> inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State. . . . And, specifically, the Commerce Clause dictates that *no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another. Brown-Forman*, 476 U.S., at 582.

Healy, 491 U.S. at 336-37 (emphasis added, footnote omitted). *Accord BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571, 573 (1996) (no state may "impose its own policy choice on neighboring States," and a state may not "impose sanctions . . . in order to deter conduct that is lawful in other jurisdictions").

Just as the "result [was] clear" in *Healy* when the foregoing guiding principles were applied to Connecticut's price-affirmation statute (491 U.S. at 337), the result is equally clear when those same principles are applied to Indiana's Territorial Application Provision. As evidenced by its very name, that Provision purports to directly regulate loan transactions that occur "wholly outside of the State's borders," and thus the Seventh Circuit correctly held that it constitutes a *per se* violation of the Commerce Clause. *See Brown-Forman Distillers v. N.Y. Liquor Auth.*, 476 U.S. 573, 579 (1986) ("When a state statute directly regulates or discriminates against interstate commerce . . . we have generally struck down the statute without further inquiry.").

Petitioner and amici Commonwealth of Virginia, et al. argue that the Seventh Circuit should have

applied the more lenient balancing test adopted by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Pet. at 24-26; Brief of Commonwealth of Virginia, et al. at 13-20. However, the *Pike* balancing test applies only where a statute "regulates even-handedly to effectuate a legitimate local public interest, *and its effects on interstate commerce are only incidental*." 397 U.S. at 142 (emphasis added). *Accord Healy*, 491 U.S. at 337 n.14 (*Pike* balancing test applies only when "a statute has only indirect effects on interstate commerce"), *quoting Brown-Forman*, 476 U.S. at 579.

The Seventh Circuit properly rejected Petitioner's effort to invoke the *Pike* balancing test. This case does not involve a statute which merely has "indirect" or "incidental" effects on interstate commerce. Instead, the Territorial Application Provision was enacted for the specific purpose of *directly* regulating wholly extraterritorial loan transactions. As noted by Judge Posner, "the effect of the territorial-application provision on an out-of-state business selling to customers in that state is more direct than in *Healy*; the provision forbids the making of title loans in Illinois to residents of Indiana on the terms agreed to by the parties." Pet. App. 11a-12a.

The argument by Petitioner and his amici that the *Pike* balancing test applies here simply because the Territorial Application Provision "vindicates compelling state consumer-protection interests" (Pet. at

24)[4] finds no support whatsoever in *Pike*, *Healy*, *Edgar* or any other decision by this Court. However well intentioned an extraterritorial law may be, it is *per se* unconstitutional under the Commerce Clause. *See Bigelow v. Virginia*, 421 U.S. at 824 ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.") The *per se* rule of invalidity applies to state laws that, like Indiana's law, directly regulate "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy*, 491 U.S. at 336.

Petitioner also proffers the argument that the Seventh Circuit erred by relying on *Healy* and *Brown-Forman* because those cases supposedly stand only for the "highly limited" proposition that state laws are invalid under the Commerce Clause "where they (1) regulate wholly extraterritorial commercial activity *and* (2) protect the state's consumers at the expense of consumers in other States." Pet. at 21 (emphasis added). *See also* Pet. at 23 (this Court's prohibition against regulating commerce wholly outside the State's borders "means only that a State may not regulate extraterritorially where to do so benefits its

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[4] *See also* Brief of Commonwealth of Virginia, et al. at 19 ("The Indiana act serves an important and traditional sovereign interest – protecting consumers from abusive practices").

own citizens only by burdening the citizens of other States.").

Petitioner does not (and, indeed, cannot) cite any language from *Healy* or *Brown-Forman* to support his novel and unduly restrictive interpretation of those decisions.[5] In fact, this Court has *not* held that extraterritorial state laws pass muster under the Commerce Clause so long as they don't "protect the state's consumers at the expense of consumers in other States." Pet. at 21. Instead, "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336. If so, the law runs afoul of the Commerce Clause, regardless of whether or not it favors the State's own citizens or imposes any burdens on citizens of other states. *See also Healy*, 491 U.S. at 337 n.14 (stating that *per se* rule of invalidity applies in *either* of two alternative scenarios: if "a state statute directly regulates or discriminates against interstate commerce, *or* when its effect is to favor in-state economic interests over out-of-state interests") (emphasis added).

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[5] Even the briefs filed by the amici curiae acknowledge that extraterritorial regulation of interstate commerce is invalid *per se*, regardless of whether it is based on economic protectionism or favoritism towards local consumers. Brief of Public Citizen, et al. at 6 ("Under the Commerce Clause, a state may not regulate commerce occurring wholly outside its borders"); Brief of Commonwealth of Virginia, et al. at 17 ("the dormant Commerce Clause imposes some limits on a State's ability to impose even facially neutral laws with an extraterritorial reach . . . ").

In sum, the Seventh Circuit's opinion was entirely faithful to this Court's controlling precedents concerning the limits placed by the dormant Commerce Clause on state efforts to engage in extraterritorial regulation. Contrary to the unfounded assertions by the amici curiae,[6] this Court's jurisprudence is clear and well-settled, and has not engendered conflicts, confusion, or uncertainty in the lower courts.

II. There Is No Circuit Split

The opinion by the Seventh Circuit did not criticize or refuse to follow any decision by another circuit court, and there is no circuit split warranting this Court's review. Neither Petitioner nor his amici has cited even a single appellate decision upholding against a Commerce Clause challenge a state law regulating loans or purchases entered into in-person wholly outside the regulating state's borders. Instead, the cases relied upon by Petitioner and his amici are all readily distinguishable. They involved multi-state transactions in which, quite unlike the present case, the consumers entered into the loans or purchases from within the confines of their home state either through the mail or over the Internet, rather than by travelling to the state of the lender or seller to enter into the transaction in-person.

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[6] *See* Brief of Commonwealth of Virginia, et al. at 7 (this Court's dormant Commerce Clause cases "provide little guidance"); *id.* at 9 ("*Edgar*, *Healy*, and *Brown-Forman* provide very limited guidance to state legislatures" and "leave wide gaps" in an important area of the law).

Petitioner first argues that the Seventh Circuit's decision conflicts with a trio of cases from the mid-1970's involving a mail order business called Aldens. Pet. at 9, citing *Aldens, Inc. v. Ryan*, 571 F.2d 1159, 1161 (10th Cir.), *cert. denied*, 439 U.S. 860 (1978); *Aldens, Inc. v. LaFollette*, 552 F.2d 745, 748 (7th Cir.),[7] *cert. denied*, 434 U.S. 880 (1977); *Aldens, Inc. v. Packel*, 524 F.2d 38, 41 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). In each of those decisions, Aldens was required to comply with the consumer credit laws of other states when its customers in those states ordered merchandise by mail through the Aldens catalogue. As emphasized by the District Court in this case, the *Aldens* cases plainly did not involve extraterritorial regulation of loan transactions, because "in each of these cases, the customer was located in his or her home state when he or she ordered merchandise and entered into the purchase contract." Pet. App. 37a at n.10.[8]

Indeed, in *Aldens v. LaFollette*, the Court had stressed that its decision on the Commerce Clause issue would have been very different if Wisconsin had sought to enforce its interest rate limitations on

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[7] It is curious indeed that Petitioner points to the Seventh Circuit decision in *Aldens* in support of his claim of a circuit split.

[8] *See also A.S. Goldmen & Co. v. New Jersey Bureau of Sec.*, 163 F.3d 780, 787 (3d Cir. 1999) ("when an offer is made in one state and accepted in another . . . elements of the transaction have occurred in each state and . . . both states have an interest in regulating the terms and performance of the contract.").

transactions entered into by Wisconsin residents outside of Wisconsin's borders:

> Suppose that many Wisconsin citizens have summer homes in Minnesota. *Wisconsin could not regulate Aldens' credit terms in mailings to Wisconsin citizens at their Minnesota summer addresses.*

552 F.2d at 751 n.10 (emphasis added).

Petitioner's reliance (Pet. at 13-14) on *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2062 (2009) is paradoxical, because the Tenth Circuit's decision actually underscores the correctness of the Seventh Circuit's decision in this case. The *Quik Payday* case involved efforts by Kansas to regulate "payday loans" made via the Internet to Kansas citizens by an out-of-state payday lender. At issue was a provision of the Kansas Uniform Consumer Credit Code which was very similar to the Territorial Application Provision adopted by Indiana, as it provided that a loan was deemed to be made in Kansas if the lender engaged in solicitation of the borrower in Kansas. Kan. Stat. Ann § 16a-1-201(1)(b).

Quik Payday argued that to the extent the Kansas statute purported to apply extraterritorially to Kansas residents who entered into Internet payday loans from their workplace computers in Missouri, it constituted a violation of the Commerce Clause. 549 F.3d at 1308. Significantly, the Kansas regulators recognized that such extraterritorial regulation would be unconstitutional. Therefore, to avoid an adverse

decision on the basis of extraterritoriality, *the Kansas regulators conceded that the statute would not apply where the loan was entered into by a Kansas resident from a computer located outside Kansas, even if there had been solicitation of the borrower in Kansas*:

> Defendants, however, have stipulated that such a transaction would not be governed by the Kansas statute. In district court they conceded that a website advertisement does not trigger application of Kan. Stat. Ann. § 16a-1-201(1)(b), even though the website is accessible in Kansas. See *Quik Payday*, 509 F.Supp.2d at 982 n. 7. Their brief in this court further clarified that the borrower's physical location at the time of the solicitation is controlling: it states that '[t]he [KUCCC] regulates the conduct of Internet payday lenders who choose to make payday loans with Kansas consumers *while they are in Kansas*.' Aplee. Br. at 24 (emphasis added). And referring to Quik Payday's hypothetical 'about a Kansas consumer leaving Kansas to acquire a payday loan,' *id.* at 25, it declared that 'The OSBC would not try to apply the [KUCCC] to loans that occur under th[ose] circumstances,' *id.* at 26.
>
> * * *
>
> It is unclear whether any of the 3,079 transactions between Quik Payday and Kansas residents involved solicitations of Kansas residents while they were in Missouri or elsewhere outside Kansas. Such a transaction would not have violated Kansas law.

549 F.3d at 1308-09 (emphasis in original).

Thus, *Quik Payday* did *not* uphold extraterritorial regulation of loans made outside of the state.[9] Instead, the Tenth Circuit's decision was fully consistent with the Seventh Circuit's holding here – a state cannot regulate a loan transaction entered into by its citizens entirely outside its borders. These decisions comport with this Court's decision in *Marquette Nat. Bank v. First of Omaha Corp.*, 439 U.S. 299 (1978). The issue in *Marquette* was whether the interest rate permitted by the lender's state or the borrower's state would apply to a national bank's loan under the National Bank Act, 12 U.S.C. § 85. The State of Minnesota, where borrowers of the bank were located, argued that its laws should apply "'[i]n the context of a national bank which systematically solicits Minnesota residents for credit cards to be used in transactions with Minnesota merchants. . . .'" 439 U.S. at 310 (citation omitted). This Court unanimously rejected this contention and held that the laws of Nebraska, where the bank was located, would apply. Although not citing to the Commerce Clause, the decision was premised in substantial part on this Court's understanding, consistent with its Commerce

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[9] The briefs filed by amici Public Citizen, et al. and the Commonwealth of Virginia, et al. each grossly mischaracterize the holding of the *Quik Payday* decision to the extent they suggest that it upheld the application of the Kansas Uniform Commercial Credit Code to loan transactions entered into by Kansas residents from computers located outside of Kansas. *See* Brief of Public Citizen, et al. at 13-14; Brief of Commonwealth of Virginia, et al. at 11-12.

Clause precedent, that one state could not regulate the interest rate charged on loans made in-person in another state. The Court pointed out that "*Minnesota residents were always free to visit Nebraska and receive loans in that State. It has not been suggested that Minnesota usury laws would apply to such transactions.*" *Id.* at 310-11 (emphasis added). Similarly, the Seventh Circuit correctly held that Illinois law, not Indiana law, applies to loans made to Indiana residents who "visit [Illinois] and receive loans in that State." *Id.*

In *Quik Payday*, the Kansas regulators acknowledged that notwithstanding the language of the Kansas statute, website advertising by the out-of-state payday lender did not suffice under the Commerce Clause to allow Kansas to regulate an ensuing loan transaction entered into wholly outside of Kansas. 549 F.3d at 1308. Similarly, in this case, the Seventh Circuit correctly ruled that Midwest's advertising in Indiana did not allow the State to regulate loans made in-person wholly outside the State's borders: "If Indiana cannot prevent Midwest from lending money to Hoosiers in Illinois, it cannot prevent Midwest from truthfully advising them of this opportunity." Pet. App. 18a.

Petitioner is also wide of the mark in relying upon the Third Circuit's decision in *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616 (3d Cir. 2009) in support of his claim of a circuit conflict. Pet. at 12. *Kaneff* is completely irrelevant here, as it merely involved a choice-of-law determination in connection

with a dispute over enforceability of an arbitration clause. It did not involve extraterritorial regulation of a loan transaction, and indeed did not even mention the Commerce Clause. Petitioner's suggestion that *Kaneff* upheld application of the borrower's state usury laws to the loan transaction at issue (Pet. at 20) is simply wrong – the Court did not decide the legality of the interest rate or which state's laws should apply to that determination.

In this case, the Seventh Circuit relied upon the Fourth Circuit's decision in *Carolina Trucks & Equip. v. Volvo Trucks, N. Amer.*, 492 F.3d 484 (4th Cir. 2007). South Carolina sought to regulate transactions in which residents of South Carolina traveled to a Georgia dealership to purchase trucks. That dealership was listed in the Yellow Pages in South Carolina, advertised in regional trade publications, and mailed brochures to South Carolina residents. *Id.* at 487. However, all sales transactions occurred on the dealership lot in Georgia. *Id.* The Fourth Circuit held that advertising in South Carolina was insufficient to subject the Georgia sales transactions to South Carolina law:

> [A] plaintiff cannot seek to apply one state's statute to transactions in another state through an expansive definition of the site of the regulated conduct. The plaintiff would hold that if a vehicle manufacturer advertised in *Car & Driver* or *Motor Trend*, or operated a direct mailing list open to all subscribers, all fifty states might properly

> assert that the manufacturer made 'sales' within their borders. Each state could thus seek to regulate the company's out-of-state conduct as connected to the sale without being held to regulate extraterritorially. This approach would take the commercial speech that is vital to interstate commerce and use it as a basis to allow the extraterritorial regulation that is destructive of such commerce. The Supreme Court, however, has indicated that the rule against extraterritorial application of state law is not a technicality to be so readily evaded. It has deemed extraterritorial statutes that seize upon a company's in-state commercial activities, such as the mailings and phone book advertising in this case, to regulate the companies' out-of-state conduct, here the Georgia truck sales.
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> * * *
>
> Concluding that Arrow's Atlanta sales occurred within South Carolina on the basis of such advertising contacts would transform the rule against extraterritoriality from a protection of commerce into a formality easily evaded. Companies would be faced with a Hobson's choice between complying with extraterritorial regulations of their out-of-state activities, and foregoing their participation in interstate trade due to the silencing of their speech.

492 F.3d at 491-92.

Apparently realizing that the Seventh Circuit's decision here does not truly conflict with the *Aldens* mail order cases and the *Quik Payday* decision relied upon by Petitioner, amici curiae Public Citizen, et al. proffer an entirely "distinct" purported circuit conflict for this Court's consideration. Brief of Public Citizen, et al. at 6, 9-13. Relying on four cases[10] that were not even cited, much less relied upon, by Petitioner, these amici claim that "[t]he lower courts disagree on the test for determining whether a state law has an impermissible extraterritorial reach." *Id.* at 6. According to these amici, even though the loans at issue here were made in-person in Illinois, the Seventh Circuit's conclusion that the Territorial Application Provision constitutes impermissible extraterritorial regulation reflects a myopic and "fragmented" Commerce Clause analysis. *Id.* at 9, 12-13.

As a threshold matter, this Court should not consider the foregoing question, as it was not presented by Petitioner. *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 97 n.4 (1991); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981). In any event, the purported circuit conflict that the amici have attempted to conjure up is no

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[10] *Pharmaceutical Care Management Ass'n v. Rowe*, 429 F.3d 294 (1st Cir. 2005), *cert. denied*, 547 U.S. 1179 (2006); *Underhill Associates, Inc. v. Bradshaw*, 674 F.2d 293 (4th Cir. 1982); *Ferndale Laboratories, Inc. v. Cavendish*, 79 F.3d 488 (6th Cir. 1996); *Southern Union Co. v. Missouri Public Service Commission*, 289 F.3d 503 (8th Cir. 2002).

more genuine than the supposed conflict claimed by Petitioner. According to the amici, the Seventh Circuit "require[s] that a law be held *per se* invalid if any fragment of the transaction occurs out of state." Brief of Public Citizen, et al. at 9. This unfounded notion is amply refuted by the Seventh Circuit's decision in *Alliant Energy Corp. v. Bie*, 336 F.3d 545 (7th Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004). The Court utilized the *Pike* balancing test to dismiss a Commerce Clause challenge to certain statutory provisions, and expressly *rejected* the appellants' argument that a statute "should be declared invalid if it has *any* extraterritorial effects." *Id.* at 547 (italics in original).

The Seventh Circuit did *not* adopt or apply a "fragmented" approach to determine if the Indiana statute constituted extraterritorial regulation; it did not even address, much less criticize, any of the four cases cited by the amici; and none of those cases conflicts with the Seventh Circuit's approach in analyzing whether a state law has an impermissible extraterritorial state reach.[11]

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[11] Indeed, the meritless claim by the amici that the Seventh Circuit's decision conflicts with the Fourth Circuit's approach is contradicted by the fact that the Seventh Circuit heavily relied upon the Fourth Circuit's decision in *Carolina Trucks*, and the *Carolina Trucks* decision had expressly relied upon the Seventh Circuit's analytical approach in an earlier Commerce Clause decision involving extraterritorial legislation. Pet. App. 10a-11a, 17a, 18a; *Carolina Trucks*, 492 F.3d at 492 n. 2.

III. The Various Other Arguments By Petitioner And His Amici Fail to Demonstrate That Certiorari Should be Granted

None of the myriad other arguments for certiorari offered by Petitioner and his amici pass muster either.

Petitioner argues that review is warranted here because "many states regulate interstate loans." Pet. at 14. However, the briefs filed by Petitioner and his amici identify statutory provisions from only three jurisdictions besides Indiana which, like the Territorial Application Provision at issue here, deem a loan to have been made in the regulating state simply by virtue of in-state solicitations or advertising. D.C. Code § 28-3301(h); Kan. Stat. Ann. § 16a-1-201(1)(b); Me. Rev. Stat. Ann. tit. 9-A § 1-201. As noted above, when the Kansas statute was challenged on Commerce Clause grounds, the Kansas regulators readily conceded that it could not apply to Internet loan transactions entered into by Kansas residents from computers located outside the state's borders, notwithstanding the lender's advertising in Kansas. *Quik Payday*, 549 F.3d at 1308-9. There have not been any appellate decisions upholding the extraterritorial application of the District of Columbia or Maine provisions cited above, so there is no conflict warranting review by this Court.

Petitioner and his amici also argue at length that consumer protection interests are implicated here. They rely on hyperbole to suggest that great harm

will befall Indiana citizens if they are allowed to travel to Illinois to enter into desired loan transactions on terms they find acceptable to themselves. *See* Pet. at 17 ("If Indiana cannot protect its citizens from unfair and deceptive trade practices, who will?"); Brief of Public Citizen, et al. at 6 ("This case will determine whether or not states will be able to continue protecting their own residents from predatory lending.").

As discussed above, the lower courts correctly recognized that a state may not directly regulate interstate commerce occurring wholly outside its borders, even if it is motivated by a desire to protect the interests of its citizens. *Bigelow v. Virginia*, 421 U.S. at 824. As analogized by Judge Posner in one of his hypotheticals, Indiana could not require out-of-state casinos to obtain a license from Indiana in order to permit gambling by Indiana residents at such casinos, nor could Indiana limit the amount of money that Indiana residents could gamble at out-of-state casinos. Pet. App. 12a. Such extraterritorial regulation would be invalid *per se* under the Commerce Clause, even if Indiana "decided that gambling had become a serious problem for its residents -- many of them were becoming addicted and this was leading to bankruptcies that were playing havoc with family life and the Indiana economy." *Id.*

There is no suggestion in the record that Midwest Title's advertising or solicitation activities in Indiana were deceptive or fraudulent. But in any event, there is nothing in the Seventh Circuit's opinion that

would immunize Midwest Title or other out-of-state lenders from potential liability if they acted unlawfully in Indiana. Thus, the *in terrorem* claim that "[t]he Seventh Circuit's approach also weakens states' ability to regulate in-state conduct" is simply made up out of whole cloth. Brief of Public Citizen, et al. at 17. Also, it should be noted that the recently-enacted "Wall Street Reform and Consumer Protection Act" creates a new Consumer Financial Protection Bureau which will greatly strengthen the ability of the federal government and state attorneys general to regulate any "unfair, deceptive, or abusive act or practice" in connection with "any transaction with a consumer for a consumer financial product or service." Public Law No. 111-203 at §§ 1031, 1036 (2010).

Petitioner's final argument (Pet. at 26-35) attempts to make much of the *dicta* at the conclusion of the Seventh Circuit's opinion speculating as to how an Indiana court might resolve choice-of-law issues in a potential future suit between Midwest Title and a defaulting Indiana borrower. Pet. App. 15a-17a. However, Midwest Title has yet to file even a *single* lawsuit in Indiana against any of its borrowers. Pet. App. 53a. Therefore, the Court's pure conjecture as to how an Indiana court "might rule" (Pet. App. 15a) on a possible choice-of-law dispute in the highly unlikely event of a future lawsuit by Midwest Title against a borrower hardly creates "unnecessary tension between due process and Commerce Clause doctrine" warranting this Court's review. Pet. at 34. There simply is no Due Process issue in this case, and

indeed the Due Process Clause is not even mentioned in the "Question Presented" by Petitioner.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BURT M. RUBLIN
Counsel of Record
ALAN S. KAPLINSKY
JEREMY T. ROSENBLUM
BALLARD SPAHR LLP
1735 Market Street
51st Floor
Philadelphia, PA 19103-7599
215.665.8500
rublin@ballardspahr.com

Counsel for Respondent

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IN THE
Supreme Court of the United States

DAVID H. MILLS, Director of the Indiana Department of Financial Institutions,

Petitioner,

v.

MIDWEST TITLE LOANS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF THE PETITION

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
HEATHER L. HAGAN
ASHLEY TATMAN HARWEL
Deputy Attorneys General

Counsel for Petitioner

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REPLY IN SUPPORT OF THE PETITION

In its brief in opposition, Midwest Title makes no attempt to address the State's central point, which is that 300% APR loans to Indiana consumers that (1) originate with Indiana-directed solicitations, (2) are secured by collateral held (and liens recorded) in Indiana, (3) are repaid from Indiana, and (4) inflict harm on Indiana residents, cannot reasonably be understood to occur "wholly outside" of Indiana. What is more, Midwest Title never refutes that, in light of conflicting circuit precedents, Pennsylvania, Oklahoma and other states may regulate Midwest Title's Illinois-executed loans to their citizens, while Indiana may not. Nor does Midwest Title seriously dispute the tension between the Commerce and Due Process Clauses that the decision below created when concluding that Indiana *borrowers* may negate their loan agreements with Midwest Title using Indiana law while an Indiana *agency* may not regulate those loans prophylactically. These conflicts and anomalies, combined with the increasing national importance of consumer-lending regulation, justify Supreme Court review.

I. No Supreme Court *Commerce Clause* Precedents Address Whether States May Regulate Transactions Executed by their Citizens in Other States, and *Due Process* Precedents Permit Such Regulation

The thrust of Midwest Title's brief is that the Seventh Circuit did nothing more than apply well-established Commerce Clause doctrine to Indiana's

attempt to protect its citizens from predatory lending. But Midwest Title stretches *Baldwin*, *Healy* and *Brown-Forman* well beyond their unusual facts—facts that had nothing to do with traditional state consumer protection laws—and ultimately must cite cases arising from *other* provisions of the Constitution. Midwest Title cites no cases where the Court has held that the Commerce Clause precludes states from applying consumer protection laws to transactions executed in other states that injure their citizens. Supreme Court review is warranted to provide necessary guidance concerning the permissible extraterritorial reach of state consumer protection laws, including usury caps.

1. *Baldwin*, *Healy* and *Brown-Forman* do not answer whether Indiana may cap interest on loans extended in other states to Indiana borrowers. *Baldwin* struck down a law prohibiting dealers from reselling in New York milk purchased outside the State at prices lower than the New York minimum. *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 519 (1935). By preventing interstate price competition, this law was classic economic protection of in-state producers, and the Court treated it as such. *Id.* *Healy* and *Brown-Forman* similarly struck down statutes that effectively dictated prices charged by out-of-state producers to out-of-state buyers. *See Healy v. Beer Institute*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986). These holdings reflect the underlying principle that the Commerce Clause

precludes protection of in-state interests at the expense of the same out-of-state interests.

This distinction is important because, in contrast with such laws, states have long played a compelling role in protecting their citizens from unfair trade practices that originate in other states. *See, e.g., Harmon v. Concord Volkswagen, Inc.*, 598 A.2d 696, 699 (Del. Super. 1991) (applying Delaware's lemon law to a car sold in Pennsylvania to a Delaware resident); *Commonwealth v. Events Int'l, Inc.*, 585 A.2d 1146, 1151 (Pa. Commw. Ct. 1991) (applying Pennsylvania law to a company that allegedly telephoned Pennsylvania consumers from Florida to solicit fraudulent contributions). Treating Indiana's usury law as equivalent to the protectionist statutes at issue in *Brown-Forman*, *Healy* and *Baldwin* ignores both the rationale for dormant Commerce Clause doctrine and the legitimate historical reach of traditional state consumer protection regulations. The Court needs to take this case to fill the evident doctrinal gap.

2. Aside from its misplaced reliance on *Baldwin*, *Healy* and *Brown-Forman*, Midwest Title attempts to establish "well-settled" Commerce Clause doctrine by citing cases arising under *other* constitutional provisions that do not support, let alone compel, the formalistic result below.[1] *See Bonaparte v. Tax*

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[1] Similarly, Midwest Title invokes a choice-of-law case decided under the National Bank Act that carries no Commerce Clause implications. *See Marquette National Bank v. First of*

Court, 104 U.S. 592 (1881) (holding that the Full Faith and Credit Clause precluded New York from preempting Maryland taxation); *Huntington v. Attrill*, 146 U.S. 657 (1892) (holding that the Full Faith and Credit Clause required Maryland to permit civil enforcement of a fraud judgment entered in New York in favor of a New York resident).

One case cited by Midwest Title, *New York Life Ins. Co. v. Head*, 234 U.S. 149, 165 (1914), is a due process choice-of-law case. Although the original contract for an insurance policy was signed in Missouri, the Court held that Missouri law did not control a later loan against the policy from the insurer to a beneficiary living in New Mexico. Missouri, the Court held, simply did not have enough significant contacts with the loan since *both* the lender and borrower resided in other states. Analytically, *Head* comports with *Allstate Insurance Company v. Hague*, 449 U.S. 302, 312-13 (1981), *Watson v. Employers Liability Assurance Corporation*, 348 U.S. 66, 72 (1954) and *Home Insurance Company v. Dick*, 281 U.S. 397, 408 (1930). In those cases, the totality of state contacts and interests yielded the source of controlling law for due process purposes, in contrast with the formalistic site-of-execution Commerce Clause rule enforced below.

Omaha Service Corp., 439 U.S. 299, 308 (1978) (holding that the National Bank Act, not state law, controlled which state's interest rate cap applied to the bank's credit-card business).

On that score, there can be little doubt that, as the Seventh Circuit agreed, under due process doctrine Indiana's usury caps could properly apply to Midwest Title's loans. Pet. 31-32; Pet.App. 16a. The Seventh Circuit's holding that the Commerce Clause nonetheless dictates a different result when Indiana engages in prophylactic regulation rather than post-hoc remedial litigation is, therefore, highly anomalous and deserving of review.

Midwest Title responds that the Seventh Circuit's analysis of the due process choice-of-law issue may be disregarded as "pure conjecture as to how an Indiana court 'might rule' on a possible choice-of-law dispute in the highly unlikely event of a future lawsuit by Midwest Title against a borrower." Opp. 32. While perhaps Midwest Title need not concern itself with collections lawsuits when it has keys to the collateral, Opp. 5-6, it is the implication of the decision below for future lawsuits, not simply its impact on present litigants, that justifies review.

In that regard, tensions between due process and Commerce Clause choice-of-law analyses could arise in any number of litigation contexts, and in particular if an Indiana borrower were to sue Midwest Title to cancel a loan contract. This prospect is not far-fetched. In the recent title-lending case *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616 (3rd Cir. 2009), a Pennsylvania borrower who drove to Delaware to execute a 300%

APR title loan prohibited by Pennsylvania sued the lender over the interest rate. The case generated a choice-of-law issue regarding arbitration, and the Third Circuit applied Pennsylvania's law owing *precisely* to its public policy against such high-interest title loans. *Id.* at 624. Yet, unless post-hoc remedies are not subject to Commerce Clause limits (and the Court has suggested otherwise, *see, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 n.17 (1996)), the Commerce Clause rule imposed here would have negated application of Pennsylvania law in *Kaneff* because the contract was executed in Delaware.

Together, this case and *Kaneff* demonstrate that the Court needs to address whether the Commerce Clause imposes strict, formalistic restraints on extraterritoriality that, unchecked, may supplant due process choice-of-law doctrine.

II. Circuits Disagree Over Whether States May Regulate Loans to Their Citizens Executed in Other States

As the Petition established, the decision below conflicts with the Third and Tenth Circuits as to whether the Commerce Clause permits states to regulate consumer loans to their citizens that are "made and executed" in other states. In *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir. 1978), and *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975), the courts permitted borrowers' home states to cap interest

rates on mail-order credit transactions fully executed in another state. The consumers' states, those courts ruled, had a sufficiently strong interest in protecting their citizens from usury to justify regulation—regardless where the loan agreement was finalized. *See Ryan*, 571 F.2d at 1161-62; *Packel*, 524 F.2d at 47-48. Similarly, in *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008), the Tenth Circuit ruled that a consumer's home state has a sufficiently strong consumer protection interest to justify regulating loans to its citizens from lenders located in other states. In this case, by contrast, the Seventh Circuit negated a borrower-state usury cap on the theory that state power turns entirely on where the transaction was "made and executed" rather than the totality of the state's regulatory interests. *See* Pet.App. 18a.

Critically, Midwest Title nowhere disputes that the laws upheld in *Ryan* and *Packel* would currently govern a Midwest Title loan to a resident of Oklahoma or Pennsylvania, thereby implicitly conceding that, had this case been litigated in either the Third or Tenth Circuit, the result would have been different. This is the hallmark of an irreconcilable circuit conflict in need of Supreme Court review (regardless whether the Seventh Circuit acknowledged it as such).

1. Midwest Title argues that the *Aldens* cases are technically distinguishable because "elements of the transaction [had] occurred in each state." Opp.

21 n.8. But the same can be said here: Midwest Title solicits customers in Indiana, uses the Indiana Bureau of Motor Vehicles to note its lien on the car title, collects payments sent from Indiana, and repossesses defaulting borrowers' cars in Indiana. Opp. 6-7.

In contrast with the decision below, the Tenth Circuit, applying this Court's precedents, "'rejected the contention' that the doctrines of place of contracting and place of performance should govern[.]" *Ryan*, 571 F.2d at 1161. Similarly, in *Quik Payday*, the Tenth Circuit permitted Kansas to regulate loans to its citizens offered from out-of-state over the internet. *Quik Payday*, 549 F.3d at 1308-09. Citing *Ryan*, the decision observed that, in light of the many interests Kansas has in relation to these loans, even regulating a loan to a Kansas resident who applied from a computer in Missouri would not be problematic under the Commerce Clause. *See id.*

Notwithstanding that express statement by the *Quik Payday* court, Midwest Title asserts (without support) that Kansas "recognized" its statute would be unconstitutional as applied to Kansas residents who "entered into Internet payday loans" while in Missouri. Opp. 22. Kansas, however, conceded no invalidity whatever, but merely said that its statute—which Midwest Title itself characterizes as "very similar" to Indiana's law—would apply only where the borrower is in Kansas when *solicited* (and that internet advertisements do not constitute

solicitations). *Quik Payday*, 549 F.3d at 1308. Indiana has similarly limited its territorial reach to loans "resulting from a solicitation received by the borrower in Indiana." Pet.App. 54a. Yet *Quik Payday* confirms that the Tenth Circuit would have ruled differently in this case.

2. Midwest Title also quibbles that the borrowers in the *Aldens* cases mailed, rather than physically handed, their loan applications to the lender. Its point apparently is that, given that distinction, no cases have upheld "a state law regulating loans or purchases entered into *in-person* wholly outside the regulating state's borders." Opp. 20 (emphasis added). For all its formalism, however, the Seventh Circuit's decision does not turn on that particular, seemingly arbitrary, characteristic. The Seventh Circuit's ruling focused on *business* aspects of Midwest Title's loan transactions, and in particular where the loan was "made and executed," Pet.App. 18a, a standard that in no way presumes any particular "in-person" location of the borrower.

Indeed, to illustrate where Midwest Title's loans are "made and executed," the court below cited the physical location not of the *borrower* but of the *lender* (and its money), as well as the location where the lender delivers the loan proceeds, where the borrower legally passes conditional title on the collateral, and where the lender receives payment. Pet.App. 17a. Those same aspects of the transactions in the *Aldens* cases were *also* located in

the non-regulating state, where final acceptance of the terms of the deal, the extension of credit, the shipment of goods subject to a purchase money security interest, and the receipt of payment took place. *See Ryan*, 571 F.2d at 1161; *Packel*, 524 F.2d at 41. *Quik Payday* confirms that the physical location of the borrower was not the critical issue in *Ryan*. *See Quik Payday*, 549 F.3d at 1308-09. Thus, Midwest Title's suggestion that those cases are distinguishable from the decision below is wholly unsupported.

3. Finally, Midwest Title attempts to smooth over the differences among circuits by citing a Fourth Circuit case, *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of North America, Inc.*, 492 F.3d 484 (4th Cir. 2007). That case neither refutes the conflict among the Third, Seventh and Tenth Circuits nor has any bearing on the validity of interstate application of traditional consumer protection laws. The South Carolina franchise law at issue prevented sales to South Carolina residents by out-of-state dealers who did not have a South Carolina franchise license. The whole point of the law was to "limit competition with local vehicle dealerships from both manufacturers and other dealers." *Id.* at 488. There has been no assertion that Indiana's consumer-lending statute similarly exists to protect in-state lenders from out-of-state competition. Accordingly, *Carolina Trucks* tells us nothing about how the Fourth Circuit (or the Third or Tenth Circuits) would have handled this case.

III. The Power of States to Protect Citizens from Predatory Loans Executed in Other States is an Important, Recurrent National Issue Deserving Review

Midwest Title suggests that Indiana's attempt to protect its consumers from out-of-state predatory lenders is "unique[.]" Opp. 1. That is incorrect; at least 20 other states have similar laws that regulate consumer loans "made and executed" in other states. *See* Pet. 17-20. Like Indiana, some states have usury laws that apply when a creditor advertises or solicits within the state. *Id.* at 17-18 (D.C., Kansas, Maine, New York, North Carolina). Others apply state law when payments are made from, or the proceeds of the loan are used in, the debtor's state. *Id.* at 19-20 (Minnesota, Ohio, Oregon, West Virginia, Vermont). Some states apply their law when a loan exceeds a certain value, carries a particular rate of interest, or is made to any resident of the state. *Id.* (Connecticut, New Mexico; Ohio, Pennsylvania, South Carolina, Virginia). Still others choose to limit liability on out-of-state loans to their residents to amounts that would be allowed for in-state loans. *Id.* (California, Oklahoma, Rhode Island, West Virginia, Wyoming). The application of *all* these laws to loans "made and executed" in another state would be affected by Supreme Court review of this case.

What is more, the multiple state statutes regulating consumer loans to their citizens reflect an

increasingly significant nationwide concern about lenders who charge high rates to the desperate and unwary. This summer alone, the Wall Street Journal has featured *two* stories in its front section—one on its front page—examining consumer lending practices and attempts to regulate that market. *See* Sudeep Reddy, *States to Protect Borrowers Who Turn to Cars for Cash*, Wall Street Journal, July 19, 2010, at A3 (discussing state attempts to protect consumers from abusive title loans); Sudeep Reddy, *Upheaval Sweeps Consumer Finance*, June 25, 2010, at A1 (discussing recent changes to state consumer finance laws). And just this month, the St. Louis Post-Dispatch examined the plight of Missouri consumers deeply indebted to title loan companies that have exploited regulatory loopholes. *See* Matthew Hathaway, *Loan Wording Circumvents Law: Missouri Lenders Avoid Limits on Title Loans by Classifying Them as Other Loans Secured With Title*, St. Louis Post-Dispatch, August 1, 2010, at E1. The newspaper told the story of Sandra Ahmedin who borrowed $800 from a title loan company to help pay her rent after incurring unexpected medical bills and now has paid at least $3,100 in interest without decreasing the principal. *Id.*

As these reports confirm, states have compelling reasons, particularly in the continuing national economic downturn, to protect their residents from over-collateralized 300% APR loans that engender cycles of unmanageable debt, no matter where those

loans are extended. And the recent actions of Indiana and other states to enforce their usury laws extraterritorially demonstrate that this issue is nationally significant. *See* Va. Code § 6.1-481 (regulating title loans to Virginia residents, no matter where executed); *Notice to those Engaging or Considering Engaging in Nonmortgage Consumer Lending to Pennsylvania Residents*, 38 Pa.B. 3986, July 26, 2008 (confirming that Pennsylvania law applies to any loan to Pennsylvania residents at annual rates greater than 6%).

Further underscoring the degree to which states perform a critical regulatory role in the area of consumer lending is the recently enacted Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (2010). First, the Act generally substantiates the national importance of financial-sector regulation in light of lender abuses. *See* Damian Paletta, *Fight Over Consumer Agency Looms as Overhaul Is Signed*, July 22, 2010, available at http://online.wsj.com/article/SB10001424052748704746804575367502836650966.html (the agency will "protect Americans from abusive financial practices such as hidden fees in the fine print, which . . . helped cause the financial crisis"). Second, while the Act itself regulates national banks, federal savings associations, and mortgage originators, it rolls back the federal government's authority to preempt states from applying consumer protection laws to national bank affiliates and makes clear that federal consumer protection standards are

merely a floor, not a ceiling. *See* Wall Street Reform and Consumer Protection Act §§ 502, 1041, 1044-1046, 1083; *see also* 12 C.F.R. 7.4008(d).

In short, states remain responsible for regulating payday loans, title loans and other non-mortgage consumer loans. Supreme Court review is necessary to create a uniform standard respecting the extent to which states may protect their citizens from predatory loans "made and executed" in other states.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
HEATHER L. HAGAN
ASHLEY TATMAN HARWEL
Deputy Attorneys General

Counsel for Petitioner

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IN THE

Supreme Court of the United States

DAVID H. MILLS, DIRECTOR OF THE INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS,
Petitioner,

v.

MIDWEST TITLE LOANS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PUBLIC CITIZEN, INC., CENTER FOR RESPONSIBLE LENDING, AARP, CONSUMER FEDERATION OF AMERICA, INDIANA LEGAL SERVICES, INC., NATIONAL CONSUMER LAW CENTER, AND THE SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

NINA SIMON
CENTER FOR RESPONSIBLE LENDING
910 17th Street NW
Suite 500
Washington, DC 20006
(202) 434-2060

BARBARA A. JONES
AARP FOUNDATION LITIGATION
200 South Los Robles
Pasadena, CA 91101
(626) 585-2628

DEEPAK GUPTA
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
dgupta@citizen.org

MICHAEL SCHUSTER
AARP
601 E Street NW
Washington, DC 20049
(202) 434-2060

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE

Public Citizen, Inc., Center for Responsible Lending (CRL), AARP, Consumer Federation of America (CFA), Indiana Legal Services, National Consumer Law Center (NCLC), and Sargent Shriver National Center on Poverty Law are non-profit organizations that advocate for consumer protection. Descriptions of each organization are in the Appendix.[1]

INTRODUCTION

In *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), this Court reversed a Seventh Circuit opinion by Judge Posner and held that Indiana could constitutionally regulate voting by shareholders of Indiana-chartered corporations, including out-of-state voting by nonresidents, to prevent abuse of the corporate form. Like the law upheld in *CTS*, the statute at issue here seeks to protect Indiana's citizens from abuse, in this case from predatory lending. As in *CTS*, the Seventh Circuit's decision calls for this Court's review.

The different approaches taken by *CTS* and the court below turn on a question of scope: Does a law violate the dormant Commerce Clause if *any part* of the regulated transaction occurs wholly out of state, or does the law violate the dormant Commerce Clause only if the *entire* regulated transaction occurs wholly out of state? That question, which has been the subject of persistent

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Counsel of record for the parties received timely notice of the intent to file this brief, and letters reflecting the blanket consent of the parties have been filed with the Clerk.

confusion in the lower courts, is enormously important. Its importance will only grow as changes in the economy force states to make new decisions about how to protect the health, welfare, and safety of their residents. Unpredictable Commerce Clause jurisprudence will likely chill legitimate state regulation, to the detriment of consumers and businesses alike.

STATEMENT

Midwest Title Loans charges Indiana borrowers an annual percentage rate (APR) of 300% for small amounts of cash secured by the titles to their cars. If a borrower cannot repay the loan at the end of the term, usually 30 days, he or she can extend the loan by paying a new round of fees. If a borrower defaults, Midwest can repossess the car in Indiana without going to court because, when it makes the loan, it takes a set of keys and records a lien with the Indiana Bureau of Motor Vehicles. These "car-title loans" present little risk to Midwest because the value of the collateral (the car) is usually twice the amount of the loan.

Midwest's business model is common to the car-title-lending industry, which at least 35 states now regulate.[2] A recent study of car-title-loan collection cases filed in Cook County, Illinois, determined that the median amount owed by defaulting title-loan borrowers was $5,462, but the median principal amount of the loans was

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[2] CFA, *Driven into Debt: CFA Car Title Loan Store and Online Survey*, Appx. A & B (2005), www.consumerfed.org/pdfs/car_title_loan_report_111705.pdf; Patrick Marley & Jason Stein, *Doyle Uses Partial Veto to Toughen Payday Loan Measure*, Milwaukee Journal Sentinel, *available at* www.jsonline.com/news/statepolitics/94195634.html.

only $1,500.[3] After repossession and sale of the collateral car, some lenders retain all of the proceeds, even if the value of the car exceeds the amount owed.[4]

Car-title loans are part of a class of predatory loan products that also includes payday loans—two-week loans made against the consumer's next paycheck, typically marketed as a cash advance to cover emergencies. The APR on payday loans is routinely more than 400% and, in some states, may be as much as 1,900%.[5] Like car-title loans, payday loan borrowers can "roll over" the loan, paying new fees every two weeks. Rollovers account for 76% of the payday-loan market and add $20 billion to the industry annually.[6] Payday lenders profit most from distressed borrowers.

Predatory lending has no single definition. A former director of the Office of Thrift Supervision adapted Justice Stewart's obscenity test: "[Y]ou tend to know predatory lending practices when you see them."[7] According to the Office of the Comptroller of the Currency, one indication that a lender engages in "abusive" lending prac-

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[3] Woodstock Inst. & Pub. Action Found., *Debt Detour: The Automobile Title Lending Industry in Illinois* 2 (Sept. 2007), www.responsiblelending.org/other-consumer-loans/car-title-loans/debtdetour_sept2007_egan.pdf.

[4] *Driven into Debt*, *supra* note 2, at 6.

[5] NCLC, Consumers Union, & CFA, *Small Dollar Loan Products Scorecard—Updated* (May 2010), www.nclc.org/reports/content/cu-small-dollar-scorecard-2010.pdf ("NCLC Scorecard").

[6] *Id.*; Leslie Parrish & Uriah King, CRL, *Phantom Demand: Short-Term Due Date Generates Need for Repeat Payday Loans* (July 9, 2009), www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf.

[7] Ellen Seidman, Office of Thrift Supervision, Dep't of the Treasury, *Strategies for Combating Predatory Lending in Our Neighborhoods* 2 (Feb. 23, 2000), www.ots.treas.gov/docs/8/87073.pdf.

tices is loans made on the liquidation value of the borrower's collateral, "rather than the borrower's independent ability to repay, with the possible or even intended result of foreclosure or the need to refinance under duress."[8] The Department of Defense, which has been concerned that service members' credit trouble affects combat-readiness, describes predatory loans as "featur[ing] high fees/interest rates ... while others pack excessive charges into the product. The result of their efforts is to obfuscate the comparative cost of their product."[9] The Department considers both payday loans and car-title loans predatory.[10]

States have a special interest in ensuring that car-title loans do not cause their residents to lose their cars because consumers who lose their cars are likely to lose their jobs.[11] As Congress has recognized, "two-thirds of all new jobs are in the suburbs," where public transit options are few, and "even in metropolitan areas with excellent public transit systems, less than half of the jobs are accessible by transit."[12] Loss of the family car can also impair consumers' ability to bring their children to school or reach medical services. A high-interest car-title

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[8] Office of the Comptroller of the Currency, *OCC Advisory Letter 2000-11: Title Loan Programs* 2 (2000), www.occ.treas.gov /ftp/advisory/2000-11.doc.

[9] Department of Defense, *Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents* 22 (Aug. 9, 2006), www.defense.gov/pubs/pdfs/Report_to_Congress_final.pdf.

[10] *Id.*

[11] *See* Tami Richards & Donald Bruce, *Car Access and Employment Outcomes for Tennessee Welfare Recipients* 1, 17 (June 2004), http://cber.utk.edu/TDHS/ffjun0400.pdf (people with access to cars more likely to become and to stay employed).

[12] Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 3037(a), 112 Stat. 107, 387 (1998).

loan of a few hundred dollars can cost a state like Indiana thousands of dollars in unemployment relief, emergency support, health care, and education.

States have been at the forefront of regulating predatory lending. Just last month, Wisconsin banned all auto-title lending in the state and began regulating payday lending.[13] Now, 36 states, including Indiana, stringently regulate some small loans.[14] These laws balance protecting consumers from predatory lending with keeping credit affordable.

At the same time, states that regulate predatory lending must be on the lookout for ways that the lending industry finds to skirt their laws. Some states take a general approach to this problem. For example, the Alabama Small Loans Act provides that the state's licensing requirements for lenders "shall apply to any person who seeks to evade its application by any device, subterfuge or pretense whatsoever." Ala. Code § 5-18-4 (2010). Other states have amended their small-loan laws' territorial application provisions—which define the circumstances under which the laws apply—to accommodate market changes that make it easier for out-of-state lenders to target their residents. For instance, the official comment to Kansas' Uniform Consumer Credit Code explains that its 2000 amendments were "driven primarily by a concern over the growing use of the Internet as a means for soliciting Kansas consumers to enter into credit transactions with out-of-state creditors." Kan. Stat. Ann. § 16a-1-201 cmt. 2 (2000). Similarly, Maine amended its statute in 2005 so that payday lenders

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[13] Marley & Stein, *supra* note 2.

[14] NCLC Scorecard. Wisconsin passed a bill regulating payday lending on May 18, 2010. *See* Marley & Stein, *supra* note 2.

"wherever located" that contract with consumers in Maine would be regulated by the Maine Law. Me. Rev. Stat. Ann. tit. 9-A, § 1-201 (2009).

This case will determine whether or not states will be able to continue protecting their own residents from predatory lending.

ARGUMENT

I. The Lower Courts Disagree On The Test For Determining Whether A State Law Has An Impermissible Extraterritorial Reach.

A. *Amici* agree with petitioner's articulation of the circuit split implicated by this case. Pet. 9-14. We write separately to highlight a distinct but related circuit split over the scope of conduct that courts should consider in determining whether a state law regulates "wholly extraterritorial" conduct.

This Court has adopted a two-tiered approach to analyzing state laws under the Commerce Clause. Regulations that directly regulate or discriminate against interstate commerce are invalid *per se*, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986), while those that regulate evenhandedly but nonetheless affect interstate commerce receive more lenient review under the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The *Pike* balancing test asks whether the challenged law's burden on interstate commerce outweighs any local interest furthered by the law. *Id.* at 142.

Under the Commerce Clause, a state may not regulate commerce occurring wholly outside its borders. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 (1989); *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982); *see also Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 n.3

(8th Cir. 1995) ("It may also be correct to say that 'extraterritorial reach' is a special example of 'directly' regulating interstate commerce. The Supreme Court has not clarified this point."). Although this Court has spoken on extraterritoriality several times, it has not stated a test for determining whether a non-discriminatory state law incidentally burdens interstate commerce or whether it impermissibly regulates extraterritorial conduct. That determination is often dispositive because it dictates whether a court applies the rule of *per se* invalidity or the *Pike* balancing test.

"[I]t is inevitable that a state's law, whether statutory or common, will have extraterritorial effects." *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 825 (3d Cir. 1994). And the Court "has never suggested that the dormant Commerce Clause requires Balkanization, with each state's law stopping at the border." *Id.* The question, then, is what scope of conduct courts should consider in determining whether a law violates the restriction on extraterritorial regulation. Should the court look at the regulated transactions as a whole and consider whether the law regulates transactions not touching the regulating state? Or should the court fragment the regulated transaction and see if any piece of the conduct comprising the transaction occurs wholly out of state? The lower courts answer differently, depending on which of this Court's cases they turn to for guidance. In particular, three of this Court's cases feed the confusion.

First, in *CTS Corp.*, this Court upheld an Indiana anti-takeover law that regulated shareholder voting for corporations organized under Indiana law, even where some shareholders were nonresidents trading their shares out of state. 481 U.S. at 93-94. *CTS* overturned a Seventh Circuit decision holding that the Indiana law

impermissibly "depriv[ed] nonresidents of the valued opportunity to accept tender offers from other nonresidents." *Dynamics Corp. of Am. v. CTS Corp.*, 794 F.2d 250, 264 (7th Cir. 1986). The Court considered the whole transaction and concluded that "a State has an interest in promoting stable relationships among parties involved in the corporations it charters." *CTS*, 481 U.S. at 92; *see also Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 653-54 (2003) (upholding a Maine law regulating prescription drug prices in Maine against a claim that this regulation necessarily influenced the terms of out-of-state wholesale contracts).

The Court took a second approach in the "price affirmation" cases. Most notably in *Healy*, the Court invalidated a Connecticut law that required beer shippers to post the price of beer in Connecticut at the beginning of each month and to affirm, under oath, that the prices that they charged in Connecticut were not higher than the prices that they charged in neighboring states. The Court concluded that Connecticut's law set a minimum price for beer sold outside of Connecticut because the shippers could not lower the price in another state below the Connecticut price. "The critical inquiry," the Court said, was "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." 491 U.S. at 336. *Healy*, however, did not specify whether a state law would violate this rule if it controlled *any* out-of-state conduct at all, or if a law would violate the rule only if it dictated the terms of transactions unconnected to the regulating state.

Three years later, the Court took a third approach in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). There, the Court held that North Dakota's sales tax violated the Commerce Clause as applied to a mail-order business that had no contact with the state beyond advertising

and the use of common carriers to deliver its product. While acknowledging that a bright-line rule might appear "artificial at its edges," *Quill* held that a mail-order transaction lacks a "substantial nexus" with a state if the seller has no physical presence in the state. *Id.* at 316. And absent a "substantial nexus," the Commerce Clause bars states from taxing a transaction. *Id.* at 311. *Quill* did not explain whether the "substantial nexus" requirement is a form of the *Pike* balancing test or a threshold test that must be satisfied before applying *Pike* balancing.

B. Lower courts make inconsistent use of these three varying approaches. The First, Fourth, Sixth, and Eighth Circuits have decided that to determine if the *per se* rule applies, courts should consider the in-state and out-of-state elements of the regulated commerce as a whole. As long as the transactions covered by the regulation touch the regulating state, these courts apply the *Pike* balancing test. The Seventh Circuit, by contrast, has interpreted *Quill* and *Healy* to require that a law be held *per se* invalid if any fragment of the transaction occurs out of state.

For example, in *Pharmaceutical Care Management Ass'n v. Rowe*, the First Circuit upheld a Maine law imposing on pharmacy benefit managers (PBMs) conflict-of-interest disclosure requirements and a fiduciary duty to health-benefit providers. 429 F.3d 294 (1st Cir. 2005), *cert. denied*, 547 U.S. 1179 (2006). The PBMs argued that the law was invalid extraterritorial regulation because it would cover an out-of-state PBM that enters into a contract outside of Maine with a national insurer operating outside of Maine, if the national insurer were licensed in Maine. *Id.* at 311. The First Circuit upheld the law because, unlike the law in *Healy*, it did not give Maine the power to determine whether the transaction

in another state "could occur at all." *Id.* at 312. Instead, the court concluded that the law "simply required that PBMs, should they choose to do business *within* Maine, provide [health benefit providers] with certain information about their business relationships. In other words, the [Maine law] ... requires only that in-state commerce be conducted according to in-state terms." *Id.* The First Circuit reached that conclusion by looking at the whole transaction that the regulation touched—from the wholesale contract through retail sale in Maine—and determined that the subsequent retail sale in Maine made the transaction "in-state" commerce.

The Fourth Circuit likewise considers the transaction as a whole when deciding whether a law has an impermissibly extraterritorial reach. In *Underhill Associates, Inc. v. Bradshaw*, the court upheld Virginia's "blue sky law," which required brokers who advertise in Virginia to register with Virginia, even if they have no physical presence in the state. 674 F.2d 293 (4th Cir. 1982). The court cared neither that the broker lacked a physical presence in the state nor that sales would likely occur over out-of-state exchanges. Because the broker advertised in Virginia, the court determined that the regulation was not wholly extraterritorial and therefore applied the *Pike* balancing test, not the *per se* rule. *Id.* at 295. Following *Underhill Associates*, a district court in the Fourth Circuit has held that state registration requirements regulate *in-state* conduct even as applied to telemarketers advertising in state who neither have a physical presence in the state nor directly call consumers living in the state. *BlueHippo Funding, LLC v. McGraw*, 609 F. Supp. 2d 576, 587 (S.D. W. Va. 2009).

Similarly, in *Ferndale Laboratories, Inc. v. Cavendish*, the Sixth Circuit upheld an Ohio law requiring a Michigan pharmaceutical wholesaler that had no physi-

cal presence in Ohio to register with state authorities as a condition to distributing its drugs to Ohio middlemen. 79 F.3d 488 (6th Cir. 1996). The court rejected the argument that *Quill* required it to find a "substantial nexus" with the state and decided that *Quill* was inapplicable to a state's use of its police powers. *Id.* at 494. Instead, the court looked at the transaction as a whole and concluded that the Ohio registration requirement regulated the ultimate sale of drugs in Ohio. Therefore, the Court concluded, the law did not have an impermissible extraterritorial reach.

The Eighth Circuit takes the same approach when analyzing a law for extraterritorial reach. In *Southern Union Co. v. Missouri Public Service Commission*, 289 F.3d 503, 505 (8th Cir. 2002), the court upheld a Missouri law that required public utilities operating in the state to seek prior approval from the state's Public Service Commission before buying stock in another utility. Southern Union, a company in Texas, had sought blanket approval to purchase noncontrolling interests in out-of-state utilities. *Id.* at 505. The Commission had ruled that such approval would be detrimental to the public interest because investment losses could harm Missouri ratepayers. *Id.* at 506. The Eighth Circuit found *Healy* inapplicable because there was no "economic protectionism" at work. *Id.* at 508. The court articulated a holistic view of the transaction: "Though Southern Union's stock purchases are no doubt made from its corporate headquarters in Texas, the Commission scrutinizes these transactions because they potentially affect the company's regulated rate of return in Missouri." *Id.* Because Missouri's law "regulates interstate stock purchases because of their impact on Southern Union's regulated local activities," the court concluded that it was a permissible

"regulation of a local public utility for the protection of local Missouri ratepayers." *Id.*

In contrast, here, the Seventh Circuit, faced with an Indiana law protecting Indiana consumers, took a markedly different approach. The court quoted *Healy* for the proposition that "[t]he Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." Pet. App. 10a (quoting *Healy*, 491 U.S. at 337). Where other circuits view a "transaction" as encompassing an entire commercial undertaking (wholesale through retail), the court below viewed a "transaction" as any single component of that undertaking.

After fragmenting the undertaking into several pieces (advertising, contract, security interest, and enforcement), the Seventh Circuit took a formalistic approach to determining where each piece occurred. As Judge Posner put it, "[t]he contract was made and executed in Illinois, and that is enough to show that the territorial application provision violates the Commerce Clause." Pet. App. 18a. The court interpreted *Quill* to stand for the principle that a law may be invalid *per se* "even though the entity sought to be regulated received substantial benefits from the regulating state" in the same transaction as the purportedly extraterritorial conduct. *Id.* at 12a. Thus, although Midwest Title advertised in Indiana, perfected its security interests using the Indiana Bureau of Motor Vehicles, and repossessed property in Indiana, Indiana cannot require Midwest to register under its small-loan law because the parties signed the contract in Illinois.

The Seventh Circuit's fragmented approach determined the result in this case. Under *Underhill Associates*, the Commerce Clause would permit Indiana to ap-

ply its registration requirement based on advertising in Indiana. Repossession in Indiana would also have likely satisfied the courts in *Rowe* and *Ferndale*, where subsequent in-state sales through a third party were sufficient to trigger state registration requirements.

Looked at from the other side, under the Seventh Circuit's fragmented approach, cases with facts identical to those considered in the other four circuits would be decided differently than they were. For example, considering the law at issue in *Southern Union Co.*, the Seventh Circuit would have viewed the potential out-of-state stock purchases as isolated (and extraterritorial) transactions. If Southern Union, a Texas company, and the non-Missouri utility signed a stock purchase agreement outside of Missouri, the Seventh Circuit would say that the fact "that the contract was made and executed" out of state was "enough to show" that the Missouri law violated the Commerce Clause. *See* Pet. App. 18a. That the regulating state may have a significant interest in protecting its in-state ratepayers would have no effect on the Seventh Circuit's ruling because its analysis applies the *per se* rule. The Eighth Circuit, by contrast, determined that Missouri's law did not violate the Commerce Clause because the law was a "regulation of a local public utility for the protection of local Missouri ratepayers." *S. Union Co.*, 289 F.3d at 508.

This Court should grant the petition to bring clarity to the law and ensure that the circuits do not decide similar cases differently.

C. Confusion over how to analyze transactions creates a special risk of anomalies concerning Internet commerce, as shown by the differing treatment of Internet lending and Internet obscenity in the case law. For example, in *Quik Payday, Inc. v. Stork*, the Tenth Cir-

cuit upheld Kansas' Uniform Consumer Credit Code as applied to out-of-state online payday lenders who made loans to Kansas residents. 549 F.3d 1302 (10th Cir. 2008). The court did not fragment the transaction to see if any of the pieces was "wholly extraterritorial" but instead considered the whole transaction: "Even if the Kansas resident applied for the loan on a computer in Missouri, other aspects of the transaction are very likely to be in Kansas—notably, the transfer of loan funds to the borrower would naturally be to a bank in Kansas." *Id.* at 1308. Similarly, the Fourth Circuit applied *Pike* balancing, not a *per se* rule, when it struck down a law criminalizing the dissemination of obscene material to minors. *PSINet, Inc. v. Chapman*, 362 F.3d 227, 239-40 (4th Cir. 2004). And at least one state court has upheld a law criminalizing the distribution of obscenity to minors under *Pike* balancing where the law included a requirement that the offending party have "lured" the minor in some way. *State v. Backlund*, 672 N.W.2d 431 (N.D. 2003).

By contrast, the Second and Tenth Circuits have struck down laws criminalizing the dissemination of obscenity to minors under the *per se* bar on extraterritorial regulation because the dissemination occurs out of state. *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 98 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999); see also *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 177 (S.D.N.Y. 1997).

The Internet has facilitated an explosion in interstate commerce, such that states protecting their residents by regulating their brick-and-mortar businesses may find their regulations less effective. Disarray in offline applications of the Commerce Clause can only increase when applied to online commerce. States need to know the permissible scope of their regulations in order to regu-

late effectively. Consumers need to know which protections they should expect as they participate in our credit-dependent economy. And businesses need to know which laws they must follow.

II. The Decision Below Invites Manipulation and Imposes The Policies Of States With Weaker Regulation On Those With Stronger Regulation.

The decision below not only exacerbates confusion and anomalies in the law, but also leads to perverse consequences. The decision allows Midwest, which has borrowers sign documents in Illinois and then perfects its security interest in Indiana, to make an end run around Indiana's consumer protection laws. Pet. App. 14a. Below, both Midwest and the court of appeals emphasized that Midwest has never sought to use Indiana's courts to enforce its claims because the claims are too small to be worth the trouble of going to court. Appellee Br. 4; Pet. App. 15a. (Indeed, Midwest's business model ensures that it will never have to go to court in Indiana—it has the keys to the car and a lien on a car that is worth more than Midwest is owed.) The court below nonetheless recognized that if Midwest did bring a claim in an Indiana court, a standard choice-of-law analysis might lead the court to apply the law of Indiana, not Illinois, because Indiana has the "most intimate contacts" with the transaction. Pet. App. 15a. Thus, under the Seventh Circuit's analysis, the state with the greatest interest in the transaction is constitutionally precluded from regulating it. Midwest's business model thus uses the machinery of Indiana law (including Indiana's Bureau of Motor Vehicles) to create a property right in Indiana that no Indiana court would enforce, but that no Indiana court will have the chance to consider.

Midwest's business model is but one contemporary example of how the innovative lending industry attempts to out-maneuver lawmakers. Thirty years ago, mail-order catalogue companies whose customers made purchases on credit unsuccessfully attempted to skirt consumer protection laws by "deeming" all aspects of the transaction to have occurred in Illinois. *Aldens, Inc. v. Ryan*, 571 F.2d 1159, 1161 (10th Cir. 1978) ("The state can regulate the consequences of commercial transactions on [their] citizens which arise or are directed from outside its borders.").[15] Today, as noted above, the Internet presents an unprecedented opportunity for companies to access consumers outside the borders of their home states and thereby avoid inconvenient regulation. Another way for lenders to avoid state regulation is known as "rent-a-tribe"—partnering with a Native-American Tribe and then challenging the application of state law as extraterritorial regulation. *E.g.*, *State v. Maybee*, __P.3d __, 2010 WL 1878752 (Or. Ct. App. May 12, 2010) (upholding an injunction prohibiting an online cigarette distributor located on a Seneca Indian reservation from selling Oregon residents brands not registered with the State). In previous cases, the small-loan industry has successfully argued that the Commerce Clause bars states from regulating their in-state brick-and-mortar businesses if they make loans only to nonresidents. *Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280 (8th Cir. 1993).

The small-loan industry is expert in creating lawless spaces at the expense of consumers. If courts rely on formalism instead of looking at the whole transaction,

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[15] *See also Aldens, Inc. v. Miller*, 610 F.2d 538 (8th Cir. 1979); *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977); *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975).

the dormant Commerce Clause will become a powerful mechanism for lenders to evade the laws of the states in which they do business.

The Seventh Circuit's approach also weakens states' ability to regulate in-state conduct. Where an out-of-state entity doing business in a state is exempt from that state's laws, the state has little choice but to exempt its domestic entities as well, so as not to put them at a competitive disadvantage. Accordingly, the vast majority of state legislatures have enacted "state parity laws" that exempt domestic businesses from predatory lending laws where out-of-state businesses operating in state are exempt.[16] As a result, the policies of states with weaker regulation overtake the policies of states that prefer greater regulation.

Moreover, states with weaker regulation may stand to gain valuable tax revenue and jobs if they can sufficiently relax their regulations to entice businesses. Regulating states do not share in these potential benefits, but they do bear the costs of non-regulation because their stricter laws do not apply to many businesses operating in their states. They can realize gain only by weakening their own laws, contrary to their policy preferences, so as to attract business. As a result, states are denied the ability to make a meaningful choice between regulating and not regulating. Only this Court can remedy that untenable state of affairs.

CONCLUSION

The petition for writ of certiorari should be granted.

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[16] Christopher L. Peterson, *Federalism and Predatory Lending*, 78 Temp. L. Rev. 1, 74-76 (2005).

Respectfully submitted,

Deepak Gupta
Counsel of Record
Allison M. Zieve
PUBLIC CITIZEN LITIGATION GROUP

Nina Simon
CENTER FOR RESPONSIBLE LENDING

Michael Schuster
AARP

Barbara A. Jones
AARP FOUNDATION LITIGATION

Counsel for Amici Curiae

June 1, 2010

APPENDIX

APPENDIX

Description of Individual *Amici Curiae*

Public Citizen, Inc. is a non-profit consumer advocacy organization founded in 1971. Public Citizen has a longstanding interest in defending states' authority to enact and enforce laws that protect their citizens from unfair or deceptive practices, including predatory-lending practices like those at issue here.

Center for Responsible Lending is a non-profit policy, advocacy, and research organization dedicated to eliminating abusive consumer lending practices. CRL is an affiliate of Self-Help, a non-profit lender that has provided more than $5 billion in financing to help more than 50,000 low-wealth borrowers buy homes, build businesses, and strengthen community resources.

AARP is a non-partisan, non-profit organization of members aged fifty and older, many of whom live in Indiana. AARP is greatly concerned about high-cost lending practices that take advantage of borrowers already in financial distress by imposing exploitive terms, such as astronomical annual percentage rates, oppressive collection practices, and extreme default penalties. Because older persons are disproportionately victimized by these practices, AARP Indiana advocated for the passage of the statute that is at issue in this case.

Consumer Federation of America, an organization of 280 national, state, and local consumer groups representing more than 50 million consumers, advances the interests of consumers through advocacy and education. One of CFA's priorities is protecting consumers who are targeted by businesses making high-cost, short-term loans. CFA has published several reports on the auto title and payday loan industries. *See, e.g.*, Amanda Quester & Jean Ann Fox, *Car Title Lending: Driving Borrowers*

to Financial Ruin (2005); Jean Ann Fox & Elizabeth Guy, *Driven into Debt: CFA Car Title Loan Store and Online Survey* (2005).

Indiana Legal Services, Inc. provides poor residents of Indiana with a variety of aggressive, quality legal services to help them gain equal access to the courts; empower them to control their lives; and reduce poverty. As part of this mission, ILSI regularly represents clients in a wide variety of consumer matters, such as debt collection, unconscionable loans, credit card defense, foreclosure and repossession defense, and bankruptcy. This case will significantly affect the rights of low-income persons in Indiana, who deserve protection from the unfair and unconscionable practices of out-of-state lenders.

National Consumer Law Center is a nationally recognized expert in consumer credit issues, focusing specifically on the legal needs of low-income, financially distressed, and elderly consumers. NCLC was the primary author of the *Small Dollar Loan Products Scorecard*, a state-by-state analysis of lending limits for payday loans, auto title loans, and installment loans for all 50 states, issued by Consumers Union in May 2010.

Sargent Shriver National Center on Poverty Law is a national not-for-profit public interest law and policy center that provides national leadership in identifying, developing, and supporting innovative and collaborative approaches to achieve social and economic justice for low-income people. The Center's Community Investment Unit takes action against poverty by advocating for policies that expand asset-building opportunities for all and has advocated for consumer protection laws, including anti-predatory mortgage lending, payday, auto-title, and consumer investment loan reform, and discouraging tax refund anticipation loans.

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No. 09-1325

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

DAVID H. MILLS,

Petitioner,

v.

MIDWEST TITLE LOANS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND ARIZONA, CONNECTICUT, IDAHO, IOWA, KENTUCKY, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, TENNESSEE AND UTAH AS *AMICI CURIAE* IN SUPPORT OF GRANTING THE PETITION

KENNETH T. CUCCINELLI, II
ATTORNEY GENERAL
OF VIRGINIA

E. DUNCAN GETCHELL, JR.
STATE SOLICITOR GENERAL
Counsel of Record
egetchell@oag.state.va.us

STEPHEN R. MCCULLOUGH
SENIOR APPELLATE COUNSEL

CHARLES E. JAMES, JR.
CHIEF DEPUTY
ATTORNEY GENERAL

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for the Commonwealth of Virginia

June 1, 2010

[Additional Counsel Listed On Inside Of Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TERRY GODDARD
ARIZONA ATTORNEY GENERAL
1275 West Washington
Phoenix Arizona 85007-2926
(602) 542-4085

GREGORY T. D'AURIA
OFFICE OF THE
ATTORNEY GENERAL
55 Elm Street
P.O. Box 120
Hartford, Connecticut 06106
(860) 808-5027

LAWRENCE G. WASDEN
IDAHO ATTORNEY GENERAL
700 West Jefferson Street,
Suite 210
Boise, Idaho 83720-0010
(208) 334-2400

TOM MILLER
ATTORNEY GENERAL OF IOWA
IOWA ATTORNEY GENERAL'S
OFFICE
2nd Floor Hoover Building
Des Moines, Iowa 50319
(515) 281-5191

JACK CONWAY
KENTUCKY ATTORNEY
GENERAL'S OFFICE
700 Capitol Avenue,
Suite 118
Frankfort, Kentucky 40601
(502) 696-5300

DOUGLAS F. GANSLER
ATTORNEY GENERAL OF
MARYLAND
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6300

MICHAEL A. COX
MICHIGAN ATTORNEY GENERAL
G. Mennen Williams
Building, 7th Floor
525 West Ottawa Street
Lansing, Michigan 48909
(527) 373-1110

JIM HOOD
MISSISSIPPI ATTORNEY
GENERAL
Walter Sillers Building
550 High Street, Suite 1200
Jackson, Mississippi 39201
(601) 359-3680

STEVE BULLOCK
ATTORNEY GENERAL OF
MONTANA
215 North Sanders St.
Helena, Montana 59620-1401
(406) 444-2026

GARY K. KING
ATTORNEY GENERAL OF
NEW MEXICO
P.O. Drawer 1508
Santa Fe, New Mexico
87504-1508
(505) 827-6000

WAYNE STENEHJEM
NORTH DAKOTA OFFICE OF
ATTORNEY GENERAL
500 North 9th Street
Bismarck, North Dakota
58501-4509
(701) 328-3640

RICHARD CORDRAY
ATTORNEY GENERAL OF OHIO
30 East Broad Street,
17th Floor
Columbus, Ohio 43215
(614) 466-8980

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF
OKLAHOMA
313 N.E. 21st Street
Oklahoma City, Oklahoma
73105-4894
(405) 521-3921

ROBERT E. COOPER, JR.
ATTORNEY GENERAL OF
TENNESSEE
OFFICE OF THE ATTORNEY
GENERAL AND REPORTER
P.O. Box 20207
Nashville, Tennessee
37202-0207
(615) 741-3491

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
Utah State Capitol
Suite #230
P.O. Box 142320
Salt Lake City, Utah
84114-2320
(801) 538-9600

QUESTION PRESENTED

Does the Commerce Clause permit a State to regulate consumer loans to its residents by a firm that advertises and conducts multiple loan-related activities in the State, but that requires all loan agreements to be signed in another State?

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INTEREST OF *AMICI*[1]

The question presented in the Petition is one of considerable importance to the *amici* States. First, the States have extensively regulated the subprime consumer lending industry to protect their citizens and residents from abusive practices. Many of these statutes contain provisions with extraterritorial effect. The holding below imperils these statutes and, at the very least, invites costly litigation. Second, in order to craft appropriate legislation, the States need clarity with respect to the limits dormant Commerce Clause doctrine imposes on statutes and regulations with extraterritorial effects. At present, those limits are blurred.

SUMMARY OF THE ARGUMENT

The Petition should be granted for two reasons. First, the States need to know the extraterritoriality limits the dormant Commerce Clause doctrine imposes on them. The States have enacted an evolving body of laws to protect their citizens against unconscionable lending practices. Many of these laws expressly seek to protect their residents from loans signed in a different State.

[1] The parties were notified ten days prior to the due date of this brief of the intention to file.

Although some guidance can be extracted from this Court's modern cases, that guidance is quite limited. Plainly, price-affirmation statutes are unacceptable. Beyond this, the reach of the extraterritoriality limit imposed by the dormant Commerce Clause is uncertain. Academic commentary also has highlighted the need for greater clarity in this area. Adding to the confusion is the fact that the lower courts are divided with respect to the limits the Commerce Clause imposes on the extraterritorial impact of a State's statutes. The approach employed by the Third and Tenth Circuits cannot be reconciled with the approach the Seventh Circuit used below.

Second, the *per se* rule of invalidity applied by the Seventh Circuit improperly prevents States from regulating transactions that are based in significant part on actions that take place within their boundaries. The core purpose animating dormant Commerce Clause doctrine is to prevent Balkanization and favoritism that is destructive of interstate commerce. The Indiana statute[2] plainly did not seek to favor local economic interests and has little impact on interstate commerce. The test here should be *Pike*

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[2] Ind. Code § 24-4.5-1-201(1)(d) (providing that a loan is deemed to occur in Indiana if a resident of the State "enters into a consumer sale, lease or loan transaction with a creditor . . . in another state and the creditor . . . has advertised or solicited sales, leases, or loans in Indiana by any means, including by mail, brochure, telephone, print, radio, television, the Internet or electronic means.")

balancing, rather than *per se* invalidity. And the statute at issue here readily survives *Pike* scrutiny.

ARGUMENT

I. STATE LEGISLATURES NEED GUIDANCE ON THE PERMISSIBLE EXTRATERRITORIAL REACH OF STATE LEGISLATION.

A. State legislation, particularly legislation regulating subprime loans, often has some extraterritorial effect.

"Subprime" consumer credit, including payday and car title lending, is a large industry with a significant impact on the States. In 2007, the Community Financial Services Association of America estimated that approximately 22,000 payday lenders extend around $40 billion in loans per year.[3] The Association estimates that over 15,000 title lenders operate in the United States.[4] Due to the punitive terms of many of these loans, borrowers often find themselves in a vicious cycle that simply makes matters worse.

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[3] Community Fin. Serv. Assn. of Am. (CFSA), About Payday Advance, http://www.cfsa.net/aboutpaydayadvance.html. (Accessed May 20, 2010).

[4] Bankrate.com, Car Title Lending: Short-Term Fix with Long-Term Expense, http://www.careprogram.us/pdfs/predatory/CarTitlePredatoryLending.pdf (Accessed May 20, 2010).

A large number of States have responded by enacting statutes to protect residents from unconscionable loan terms.[5] Many of these statutes apply to transactions whenever the lender reaches into the State from another State to solicit business. For example, Kan. Stat. Ann. § 16a-1-201(1)(b) deems that a transaction occurs in Kansas if "the creditor induces the consumer who is a resident of this state to enter into the transaction by solicitation in this state by any means, including but not limited to: Mail, telephone, radio, television or any other electronic means."[6] Other States regulate loans when

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[5] *See* Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: the Fringe Banking System and its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. Rev. 589, 599 (2000) (noting a typical interest rate in the 200% to 300% range).

[6] *See also* Me. Rev. Stat. Ann. tit. 9-A, § 1-201(B) (credit transaction is deemed to occur in Maine if "[t]he creditor, wherever located, induces the consumer who is a resident of [Maine] to enter into the transaction . . . by face-to-face, mail, telephone or electronic mail solicitation in this State"); Okla. Stat. Ann. tit. 14A §§ 1-201(5) & 1-201A (requiring an Oklahoma license for any lender who issues a loan from another State to an Oklahoman, and precluding such lender from "collect[ing] charges through actions or other proceedings in excess of those permitted by" Oklahoma law or "enforc[ing] rights against the . . . debtor, with respect to the provisions of agreements which violate" Oklahoma law); 69 Pa. Cons. Stat. Ann. § 1103 (statute applies if "[a]ny solicitation or communication to sell, verbal or written, originating outside the Commonwealth of Pennsylvania but forwarded to and received in Pennsylvania by a resident buyer of Pennsylvania"); Wyo. Stat. Ann. § 40-14-120(a)(ii) (applying Wyoming consumer protections where "[t]he creditor induces consumers who are residents of this state to enter into credit

(Continued on following page)

payments are made from that State. *See* W. Va. Code § 46A-1-104 (applying West Virginia law if a West Virginia resident is induced to enter into a consumer loan "by personal or mail solicitation, and the goods, services or proceeds are delivered to the consumer in this state, and payment on such account is to be made from this state.").[7]

Some States are silent with respect to the extraterritorial reach of their regulations of subprime loans, but do not by their terms exclude application of the statute to a resident who signed a contract in another State. *See* 2010 Oregon Laws 1st Sp. Sess. Ch. 23 (S.B. 993) (applying to payday or title loans made to Oregon residents "if the consumer makes a payment on the payday loan or title loan from [Oregon].").[8] Finally, still other States simply preclude

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transactions by a continuous and systematic solicitation either personally or by mail and the goods or money are delivered in this state and payment is made from this state"). *See also* D.C. Code § 28-3301(h) (regulating consumer credit transactions involving a D.C. resident if the lender "has solicited or advertised in the District of Columbia by any means, including mail, brochure, telephone, print, radio, television, internet, or any other electronic means").

[7] *See also* Vt. Stat. Ann. tit. 8 § 2238 (applying if the commercial loan is made "for use" in Vermont); Minn. Stat. Ann. § 47.601, sub. 3 (applying Minnesota law to out-of-state lenders that "make[ ] a consumer small loan electronically via the Internet").

[8] *See also* Va. Code Ann. §§ 6.1-445 (requiring a license if any payday loans are made to any person residing in Virginia, "whether or not the [lender] has a location in the Commonwealth") and 6.1-469.1 (same).

enforcement of loans that exceed a certain interest rate. *See* Ohio Rev. Code Ann. § 1321.17 (precluding enforcement of loan contracts that exceed Ohio's allowable rate of interest, including those made by lenders from other States who primarily make loans by mail).[9] Given the creativity of the subprime lending industry and the desire of States to protect consumers, the trend of regulating subprime loans is unlikely to recede for the foreseeable future.[10]

Nor is the trend of States regulating loans executed in other States likely to go away. Extensive cross-border lending is inescapable. Nearly all States contain extensive border areas with other States, and many cities straddle state borders. For example, in *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616 (3rd Cir. 2009), a Pennsylvania resident signed a car title loan in Delaware. *Id.* at 618. The borrower sought relief from several clauses in the contract in a state court action filed in Pennsylvania. *Id.* at 619. In Virginia, the metropolitan Washington, D.C. area contains an agglomeration of municipalities from the District, Northern Virginia and Maryland. On the other side of the Commonwealth, the City of Bristol is

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[9] *See also* N.C. Gen. Stat. § 53-190(a) (applying restrictions on loans if solicitation occurred outside of the State).

[10] Subprime lenders have proved quite adept at circumventing regulatory controls. After Virginia regulated payday lenders, subprime lenders simply moved into title lending—in turn prompting legislation to govern those loans. *See* 2010 Va. Acts. ch. 477 (imposing new restrictions on car title loans).

located in part in Virginia and in part in Tennessee. A citizen can cross the state border simply by walking across the street. Any comprehensive State effort to protect its citizens against abusive lending practices will have to deal with "extraterritorial" lending.

B. Despite the importance of the issue, the limits on a State's extraterritorial reach are unclear.

1. A trio of cases from this Court addresses the extraterritoriality and the dormant Commerce Clause, but these decisions provide little guidance beyond the facts of those cases. In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), "the fount of the modern extraterritoriality decisions,"[11] this Court reviewed the propriety under the dormant Commerce Clause of an Illinois anti-takeover statute. The statute governed transactions "not only with . . . stockholders living in Illinois, but also those living in other States and having no connection with Illinois." *Id.* at 642. The statute could even "regulate a tender offer which would not affect a single Illinois shareholder." *Id.* at 642. A plurality of the Court, finding that "the Illinois statute . . . has a sweeping extraterritorial effect," *id.*, suggested that States may not regulate a transaction unless that transaction occurs entirely within the boundaries of the State and that regulation having

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[11] Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 805 (2001).

"direct" extraterritorial effects should be declared *per se* invalid. *Id.* at 641-43. That part of the opinion did not, however, garner a majority of the Court. The only portion of Justice White's opinion that was joined by a majority of Justices was the portion applying the *Pike* balancing test, and concluding that the Illinois statute did not pass this test. *Id.* at 625.

In *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) and *Healy v. The Beer Institute*, 491 U.S. 324 (1989), the Court again invoked the extraterritoriality principle, this time to strike down price-affirmation statutes. *Brown-Forman*, 476 U.S. at 581-82; *Healy*, 491 U.S. at 337-39. The fundamental problem with price-affirmation statutes was this: once a distiller filed a price schedule with the New York Liquor Authority on, for example, May 25, say, for the month of July, it effectively became the law of New York that the distiller could not sell at a lower price for that month to a wholesaler in Texas. Any sale by the distiller at a lower price in Texas in July would be subject to sanction by the New York Liquor Authority. New York effectively had forced an out-of-state merchant "to seek regulatory approval in one State before undertaking a transaction in another." *Brown-Forman*, 476 U.S. at 582. In addition to extraterritorial reach, these statutes presented the additional risk of "price gridlock" as more and more States imposed price-affirmation laws. *Healy*, 491 U.S. at 340.

Edgar, *Healy*, and *Brown-Forman* provide very limited guidance to state legislatures. The Court held that a State exceeds the permissible bounds of the dormant Commerce Clause when it "directly controls commerce occurring *wholly* outside the boundaries of the State." *Healy*, 491 U.S. at 336 (emphasis added). When a Texas distiller sells in Texas to a Texas consumer, the transaction takes place "wholly" outside New York. If a New York law reaches out to dictate the terms of that transaction, the State has exceeded the bounds of what it may permissibly regulate. That is not the case with respect to the States' subprime lending statutes, which regulate transactions involving their respective residents. Here, for example, the agreement was reached in Illinois but the Indiana resident would perform his end of the bargain from Indiana. This Court's dormant Commerce Clause decisions leave unresolved what constitutes a transaction that occurs "wholly" outside a State's boundaries.

The Court has stated that a State cannot "directly control" regulation of commerce that occurs "wholly" outside of a State's boundaries. *Id.* It is similarly not clear what constitutes "direct" regulation versus "indirect" regulation. All told, while *Edgar*, *Brown-Forman* and *Healy* provide some limited guidance to State legislatures, they leave wide gaps in an increasingly important area of the law.

2. Recent scholarship underscores the need for this Court to provide guidance. Professor Florey notes that constitutional limits on the extraterritorial

application of State law have been "murky and contradictory," yielding "no clear answer" as to when the Commerce Clause or the Due Process Clause limit a State's police power. Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle In Choice of Law and Legislation*, 84 Notre Dame L. Rev. 1057, 1061 (2009). *See also* Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 Notre Dame L. Rev. 1133, 1154 (2010) ("[C]onstitutional doctrine to this day does not clearly tell us to what extent states may regulate people and things outside their borders."); Jack L. Goldsmith, Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. at 784 (noting that "[t]he scope of the extraterritoriality principle is unclear. . . .").

3. Adding to this confusion is the conflicting approaches of the circuits. Under the jurisprudence of the Third or Tenth Circuits, the Indiana statute at issue would have been upheld as a proper exercise of the State's power under the dormant Commerce Clause. In those circuits, the fact that a transaction was finalized in another State is immaterial for Commerce Clause purposes so long as the measure survives *Pike*[12] balancing.

Thus, in *Aldens, Inc. v. Packel*, 524 F.2d 38 (3rd Cir. 1975), the court upheld against a Commerce Clause challenge a Pennsylvania statute that capped

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[12] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

interest rates for mail order transactions. Aldens, a mail order company, solicited orders from all States, but had no employees or tangible property in Pennsylvania. *Id.* at 41. The orders were filled from outside Pennsylvania. *Id.* The credit agreements provided for the retention of a purchase money security interest in the merchandise, but Aldens did not file a security interest document. *Id.* The Third Circuit held that applying Pennsylvania's interest cap to the contract did not violate the Commerce Clause. *Id.* at 45-50. Balancing Pennsylvania's interest in protecting its consumers with the cost the measure imposed on interstate commerce, the court held that the measure was a valid exercise of state power. *Id.* at 50.

Likewise, the Tenth Circuit in *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir. 1978), upheld against a Commerce Clause challenge an Oklahoma law governing mail order contracts between an Illinois company and Oklahoma residents. *Id.* at 1161-62. The court concluded that a State could enact statutes "which affect commerce unless the burden so imposed greatly exceeds the extent of the local benefits" and held that the statute satisfied this test. *Id.* at 1162.

The reasoning in the Tenth Circuit's more recent decision in *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2062 (2009), also cannot be squared with the decision below. In addressing the scope of the extraterritoriality principle, the court reasoned that a loan transaction does not occur "wholly" outside of Kansas when a loan

disbursement is made to a bank located in Kansas, even if the Kansas resident is out of state at the time he applies for a loan from a lender that is also located out of state. *Id.* at 1308. The Tenth Circuit recognized that a "transaction" contains several component parts and a State does not violate the extraterritoriality principle simply because a resident and a lender sign the contract outside of the territorial boundaries of a state. The court declined to apply the framework of *per se* invalidity and instead applied *Pike* balancing. *Id.* at 1309-13.

The contacts between Indiana and the transaction here are at least as great as the contacts involved in a mail order transaction. The loan company here, although physically located in a neighboring State, advertised in Indiana, payments on the loan are intended to be made from Indiana by an Indiana resident, the loan company can file a lien on the motor vehicle with the Indiana Bureau of Motor Vehicles, and any repossession of the vehicle would take place in Indiana. App. at 48a-53a. The lender undoubtedly knows when it is dealing with an Indiana resident.

The key for the Seventh Circuit was the fact that the contract is executed in another State. App. 17a. It is not clear why that fact is constitutionally dispositive. In the *Aldens* cases, the contract was not final until the mail order company received the order and agreed to fill it. Indeed, the Aldens "credit agreement recite[d] that it is an Illinois contract, and all orders are accepted in Illinois." *Aldens*, 571 F.2d at 1161. In short, in the Third and Tenth Circuits a

State may regulate a contract even if it is reached or finalized in one State, provided the contract is to be performed at least in significant part in that state. In contrast, in the Seventh Circuit, a State has no authority to regulate a contract that is finalized in another State, even if it will be performed in large part in the regulating State. The Court should grant certiorari to provide guidance to state legislatures, administrative agencies and to the lower courts.

II. THE *PER SE* RULE OF INVALIDITY EMPLOYED BY THE SEVENTH CIRCUIT IS UNDULY RESTRICTIVE OF STATE AUTHORITY.

A. As a general proposition, the Constitution does not preclude a State from exercising its police power simply because some component of a transaction occurs beyond the borders of that State.

Upon declaring independence from the British Crown, the former colonies became sovereign entities, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991), with the "Full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." *Declaration of Independence* (capitalization original). Indeed, the Articles of Confederation confirmed that the States retained their "sovereignty, freedom, and independence, which is not by this confederation expressly delegated to the

United States, in Congress assembled." *Articles of Confederation*, art. II.

It is settled law that a sovereign nation-state may regulate conduct that is intended to have, and does have, an effect within the territory of another sovereign state.[13] The United States has done so in various areas, including antitrust law.[14] To be sure, upon entering the Union, the States forfeited certain sovereign prerogatives. *See, e.g.*, U.S. Const. art. I, § 10. The text of the Constitution does not, however declare a categorical bar on all state laws that have some extraterritorial reach. Nor as a practical matter could it. "[I]t is inevitable that a state's law, whether statutory or common law, will have extraterritorial effects." *Instructional Sys. v. Computer Curriculum Corp.*, 35 F.3d 813, 825 (3rd Cir. 1994). This can be seen in various lines of decision by this Court.

For example, in the criminal context, the "detrimental effects" theory of jurisdiction allows a State to prosecute a person who commits an act within one State when the criminal consequences of

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[13] *See, e.g.*, Restatement (Second) of the Foreign Relations Law of the United States § 18 (1965).

[14] *See, e.g.*, *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416, 443-45 (2nd Cir. 1945) (Learned Hand, J.) (concluding that although Congress did not intend the Sherman Act to prohibit conduct having no effect in the United States, it did intend the Act to reach conduct having consequences within this country even where the parties concerned had no allegiance to the United States if the conduct is intended to and actually does have an effect upon United States imports or exports).

that act occur in another State. *See Strassheim v. Daily*, 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power."); *Skiriotes v. Florida*, 313 U.S. 69, 79 (1941) (upholding application of a Florida statute prohibiting sponge fishing to a Florida citizen's activities that occurred wholly outside of Florida's territorial waters). *See also Simpson v. Georgia*, 17 S.E. 984 (Ga. 1893) (Georgia had jurisdiction to try defendant who fired a shot from South Carolina into Georgia, intending to harm a person there); *Hageseth v. Superior Court*, 59 Cal. Rptr. 3d 385 (Cal. Ct. App. 2007) (California had jurisdiction to prosecute physician who practiced in Colorado but did not have a valid California medical license, when he prescribed a drug over the Internet to a Californian).

Similarly, the Due Process Clause does not forbid a State from asserting its regulatory authority over a transaction that has a connection to the regulating State. In *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954), the insurer argued that Louisiana had violated the extraterritoriality principle by hearing an action on an insurance contract that had been negotiated out-of-State. *Id.* at 70-71. The Court rejected the argument, noting that Louisiana may assert its regulatory authority over injuries that occur in the State. *Id.* at 72-73. In contrast, in *Home*

Insurance Co. v. Dick, 281 U.S. 397, 408 (1930), the Court held that Texas could not regulate an insurance policy issued in Mexico, by a Mexican insurer to a Mexican citizen. The Court noted, however, that the decision might have been different had activities relating to the contract taken place in Texas upon which the State could point to as a basis for regulation. *Id.* at 408 n.5.

At least in the criminal context and insofar as the Due Process Clause is concerned, so long as a sufficient connection exists, a State can assert its police power to protect its residents based on activities that occur outside the territory of the regulating State.

B. A far reaching extraterritoriality concept is not necessary to preserve the core protection to interstate commerce afforded by the dormant Commerce Clause.

Where the Commerce Clause limits a State's ability to exercise its police power, it is not because the Constitution limits a State's authority to protect its citizens to transactions that occur, in their entirety, within the territorial boundaries of a State. Rather, it must be because a particular exercise of a State's police power is harmful to interstate commerce.

The central purpose of the dormant Commerce Clause is to avoid "economic Balkanization," *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979), which is

manifested by state and local laws that discriminate against out-of-State entities or interstate commerce itself. *Kentucky Dep't of Revenue v. Davis*, 553 U.S. 328, 343 (2008). There is no argument here that Indiana's statute was designed to favor local economic interests or that it would trigger retaliatory measures by other States. Therefore, the statute does not infringe on the core purpose of the dormant Commerce Clause doctrine.

Although the dormant Commerce Clause imposes some limits on a State's ability to impose even facially neutral laws with an extraterritorial reach, the *per se* rule adopted by the Seventh Circuit is unduly broad and is not needed to protect the flow of interstate commerce. First, Congress can override state legislation through its Commerce power.[15] Second, a State cannot regulate conduct in another State that does not involve its own residents or conduct that has no effect within the State. A State can have no interest in such matters. *See Edgar*, 457 U.S. at 644 (a "State has no legitimate interest in protecting nonresident shareholders").

Third, *Pike* balancing restricts the ability of a State to impose burdens unjustified by a local interest. Among those burdens is the danger of inconsistent legislation. If a party is subject to "inconsistent legislation" from different States, a law's "practical effect" might lead to a Commerce

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[15] U.S. Const. art. I, § 8.

Clause violation. *See, e.g., Healy*, 491 U.S. at 336-37; *Brown-Forman*, 476 U.S. at 582-83; *Edgar*, 457 U.S. at 642-43. On the other hand, state laws which merely create additional, but not irreconcilable, obligations are not considered to be "inconsistent" for this purpose. *See Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 784 n.9 (3rd Cir. 1992).

The Due Process and the Full Faith and Credit Clauses impose further limitations on a State's ability to impose regulations with some extraterritorial effect. *See, e.g., Dick*, 281 U.S. at 408 (Texas could not regulate an insurance policy issued in Mexico, by a Mexican insurer to a Mexican citizen). *See also Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981) (noting similarity of analysis under the Due Process Clause and the Full Faith and Credit Clause).

An overbroad prohibition on state laws having some extraterritorial effect will needlessly curb the proper exercise of a State's sovereign police power to protect its residents from abusive lending practices without any corresponding benefit to the flow of interstate commerce.

C. The Indiana statute easily survives *Pike* balancing.

Because the Indiana statute is "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental," *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), the Indiana act

will be "upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike,* 397 U.S. at 142. "A statute need not be perfectly tailored to survive *Pike* balancing, but it must be reasonably tailored: 'the extent of the burden that will be tolerated . . . depends on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.'" *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 569 (4th Cir. 2005) (quoting *Pike*, 397 U.S. at 142). The Indiana act survives *Pike* balancing for two reasons.

First, this Court should not "rigorously scrutinize economic legislation passed under the auspices of police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause." *See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007) (Roberts, C.J., joined by Souter, Ginsburg, & Breyer, JJ., announcing the judgment of the Court).

Second, the benefits to the citizens of Indiana clearly outweigh any burden on interstate commerce. The Indiana act serves an important and traditional sovereign interest—protecting consumers from abusive practices. The purpose of the Indiana law was to establish safeguards that would reduce the likelihood that Indiana residents would become

impoverished as a result of sharp lending practices. The burden of such regulation on title lenders is minimal. Those costs are avoided simply by refusing to enter into transactions with Indiana residents. The statute has no influence whatsoever on a title lender's business with residents from any other states. Moreover, the burdens are hardly unreasonable when considered in light of the protections that they afford to persons in difficult financial circumstances.

CONCLUSION

For the reasons stated above and in the Petition itself, the Petition for Certiorari should be **GRANTED**.

Respectfully submitted,

KENNETH T. CUCCINELLI, II
Attorney General
of Virginia

E. DUNCAN GETCHELL, JR.
State Solicitor General

STEPHEN R. MCCULLOUGH
Senior Appellate Counsel

CHARLES E. JAMES, JR.
Chief Deputy
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for the
Commonwealth of Virginia

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[Additional Counsel Listed
On Inside Of Cover]